

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

On Writ of Certiorari to Aiken County
Honorable R. Scott Sprouse, Circuit Court Judge
Appellate Case No. 2018-001674

RECEIVED

JUN 27 2019

JOHN UPSON,

~~Respondent~~
SUPREME COURT

vs.

THE STATE,

Petitioner.

APPENDIX

ALAN WILSON
Attorney General

TOMMY A. THOMAS
Attorney at Law

MARK R. FARTHING
Assistant Attorney General

Post Office Box 88
Irmo, SC 29063
(803) 732-5507

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEY FOR RESPONDENT

ATTORNEYS FOR PETITIONER

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ARREST WARRANT

2013A0220101013

STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of

City of Aiken

14-14864

THE STATE
against

John Lyndon Upson

Address: 324 Newberry St. Nw
Aiken, SC 29801-Phone: _____ SSN: _____
Sex: M Race: B Height: 5 8 Weight: 250DL State: SC DL #: _____DOB: 1971 Agency ORI #: SC0020100Prosecuting Agency: Aiken Public SafetyProsecuting Officer: William RoysterOffense: ROBBERY/ WHILE ARMED W/DEADLY WEAOffense Code: 139Code/Ordinance Sec: 16-11-0330(A)This warrant is CERTIFIED FOR SERVICE in the
☐ County/ ☐ Municipality ofThe accused
is to be arrested and brought before me to be
dealt with according to the law.

(L.S.)

Signature of Judge

Date: _____

RETURN

A copy of this arrest warrant was delivered to
defendant John L. Upson
on 12-2-2013

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

Aiken Municipal Court
251 Laurens St., N.W.
Aiken, SC 29801

STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of

City of Aiken

AFFIDAVIT

Form Approved by
S.C. Attorney General
April 21, 2009
SCCA 118Personally appeared before me the affiant William Royster who
being duly sworn deposes and says that defendant John Lyndon Upson
did within this county and state on 11/27/2013 violate the criminal laws of the
State of South Carolina (or ordinance of ☐ County/ ☒ Municipality of City of Aiken)
in the following particulars:DESCRIPTION OF OFFENSE: ROBBERY/ WHILE ARMED W/DEADLY WEAPOI further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:Upon information and belief one John L. Upson did commit the offense of Armed Robbery. That on 11-27-13 at 22:25
hours he along with one other person entered the Capt. D's restaurant 1907 Whiskey Rd and forced the manager to open
the safe and hand over the money. The second subject was armed with a semi auto pistol.
Upson has been in the restaurant in the past and is known to several of the employee's.
This act being in violation of South Carolina Code of Laws and did take place in the city of Aiken SC.

Signature of Affiant

STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of

City of Aiken

Affiant's Address 251 LAURENS ST NWAIKEN, SC 29801-Affiant's Telephone (803)642-7620 x 0000

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that

on 11/27/2013 defendant John Lyndon Upson

did violate the criminal laws of the State of South Carolina (or ordinance of

☐ County/ ☒ Municipality of City of Aiken) as set forth below:DESCRIPTION OF OFFENSE: ROBBERY/ WHILE ARMED W/DEADLY WEAPOHaving found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or
her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as
soon thereafter as is practicable.

Sworn to and subscribed before me

on 11/28/2013

Signature of _____ (L.S.)

Judge's Address _____

Judge's Telephone _____

Judge Code: 005Issuing Court: ☐ Magistrate ☐ Municipal ☐ Circuit

ORIGINAL

BAIL set by
Judge G. Fallow
on 12-2-13
Type and Amount: DENIED
Name of Surety: _____

PRELIMINARY HEARING held by

Judge _____
on _____
Defendant Attorney: _____
Decision: _____

DISPOSITION before

Judge _____
on _____
by _____
(indicate jury trial, bench trial, plea, not, prob., etc.)
Disposition: _____
Sentence: _____

JURORS

WITNESSES

Name: _____
Address: _____
Telephone: _____

Name: _____
Address: _____
Telephone: _____

Name: _____
Address: _____
Telephone: _____

Name: _____
Address: _____
Telephone: _____

Name: _____
Address: _____
Telephone: _____

Name: _____
Address: _____
Telephone: _____

Name: _____
Address: _____
Telephone: _____

Name: _____
Address: _____
Telephone: _____

CODEFENDANTS

WITNESSES

Aiken Department Of Public Safety

William R Royster

Law Enforcement Case #: 14-14864

JAS

ARREST WARRANT NUMBER

FILED January 9 2014
2013A0220101013

Shannon D. Rosenblantz
S.C.C.P. & G.S.
Deputy Clerk

ACTION OF GRAND JURY

True Bill

Robert Wade

Foreperson of Grand Jury
Date: January 9, 2014

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2014GS0200074

The State of South Carolina

County of Aiken

COURT OF GENERAL SESSIONS

JANUARY TERM 2014

**THE STATE
vs.**

JOHN LYNDON UPSON

CDR #: 0139

Indictment for

ARMED ROBBERY

§ 16-11-0330(A)

J. STROM THURMOND, SOLICITOR

APP'X 273

STATE OF SOUTH CAROLINA)

INDICTMENT FOR
ARMED ROBBERY

COUNTY OF AIKEN)

§ 16-11-0330(A)

At a Court of General Sessions, convened on January 13, 2014, the Grand Jurors of Aiken County present upon their oath:

That JOHN LYNDON UPSON along with another, did in Aiken County on or about November 27, 2013, while armed with a deadly weapon or while alleging either by action or words that he was armed while using a representation of a deadly weapon or an object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, to wit: a handgun, feloniously take from the person or presence of Devin Johnson by means of force or intimidation goods or monies of Captian D's, such goods or monies being described as follows: U.S. currency, all in violation of §16-11-330, Code of Laws of South Carolina (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



J. STROM THURMOND, SOLICITOR

APP'X 274

WITNESSES

Aiken Department Of Public Safety

William R Royster

Law Enforcement Case #: 14-14864

JAS

ARREST WARRANT NUMBER

13-DI02-0105

FILED

January 9, 2014

Luis Godard Jr.
Clerk of CourtSharon D. Rose (Granty)
Deputy Clerk**ACTION OF GRAND JURY**

True Bill

Foreperson of Grand Jury
Date: January 9, 2014**VERDICT**Foreperson of Petit Jury
Date:DOCKET NO. 2014GS0200079**The State of South Carolina**

County of Aiken

COURT OF GENERAL SESSIONS**JANUARY TERM 2014****THE STATE
vs.****JOHN LYNDON UPSON****CDR #: 0095****Indictment for****KIDNAPPING****§ 16-03-0910****J. STROM THURMOND, SOLICITOR**

STATE OF SOUTH CAROLINA)
)
COUNTY OF AIKEN)
)

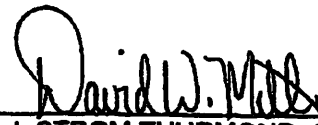
INDICTMENT FOR
KIDNAPPING

§ 16-03-0910

At a Court of General Sessions, convened on January 13, 2014, the Grand Jurors of Aiken County present upon their oath:

That JOHN LYNDON UPSON did in Aiken County on or about November 27, 2013, unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away Jameshia Alton without authority of law, all in violation of §16-3-910 of the Code of Laws of South Carolina (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



J. STROM THURMOND, SOLICITOR

WITNESSES

Aiken Department Of Public Safety

William R Royster

Law Enforcement Case #: 14-14864

JAS

ARREST WARRANT NUMBER

13-DI02-0106

FILED January 9 2014

L. J. Haddad Jr.
J.C.C.P.A.G.S.

Shannon W. Rosen (County)
Deputy Clerk

ACTION OF GRAND JURY

True B:11

Robert Wade
Foreperson of Grand Jury
Date: January 9, 2014

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2014GS0200080

The State of South Carolina

County of Aiken

COURT OF GENERAL SESSIONS

JANUARY TERM 2014

**THE STATE
vs.**

JOHN LYNDON UPSON

CDR #: 0095

Indictment for

KIDNAPPING

§ 16-03-0910

J. STROM THURMOND, SOLICITOR

APP'X 277

STATE OF SOUTH CAROLINA)

COUNTY OF AIKEN)

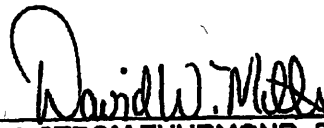
INDICTMENT FOR
KIDNAPPING

§ 16-03-0910

At a Court of General Sessions, convened on January 13, 2014, the Grand Jurors of Aiken County present upon their oath:

That JOHN LYNDON UPSON did in Aiken County on or about November 27, 2013, unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away Scott Hall without authority of law, all in violation of §16-3-910 of the Code of Laws of South Carolina (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



J. STROM THURMOND, SOLICITOR

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

IN THE COURT OF GENERAL SESSIONS
CASE NUMBERS: 2014-GS-02-074,
2014-GS-02-079, & 2014-GS-02-080

STATE OF SOUTH CAROLINA,
vs.
JOHN LYNDON UPSON,
DEFENDANT.

VERDICT FORM

1. As to indictment 2014-GS-02-074, the charge of Armed Robbery, we the Jury find the Defendant:

☒ Guilty.

☐ Not Guilty.

2. As to indictment 2014-GS-02-079, the charge of Kidnapping of [REDACTED] we the Jury find the Defendant:

☒ Guilty.

☐ Not Guilty.

3. As to indictment 2014-GS-02-080, the charge of Kidnapping of [REDACTED] we the Jury find the Defendant:

☒ Guilty.

☐ Not Guilty.

FILED April 16 2014
Luis Adas
CLERK
Shannon D. [Signature]
Deputy Clerk

PLEASE NOTIFY THE BAILIFF WHEN YOU HAVE COMPLETED THIS FORM.

I certify this decision was the unanimous decision of the jury.

Suzanne F. Dyke
Foreperson

April 16, 2014

PLEASE NOTIFY THE BAILIFF WHEN YOU HAVE COMPLETED THIS FORM.

APP'X 280

STATE OF SOUTH CAROLINA

COUNTY OF
STATE

Aiken

VS.

John Lyndon Upson

AKA:

Race: Black Sex: M Age: 42

DOB: SS#

Address:

City, State, Zip:

DL#: SID#:

*CDL Yes ☐ No ☒ CMV Yes ☐ No ☒ Hazmat Yes ☐ No ☒
 In disposition of the said indictment comes now the Defendant who was
 TO: Kidnapping / Kidnapping

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2014GS0200079

A/W#: 13-DI02-0105

Date of Offense: 11/24/2013

S.C. Code §: 16-03-0910

CDR Code #: 0095

SENTENCE SHEET

0-30 years

☒ CONVICTED OF or ☐ PLEADS

in violation of § 16-03-0910

of the S.C. Code of Laws, bearing CDR Code #

0095

☐ NON-VIOLENT☒ VIOLENT☐ SERIOUS☒ MOST SERIOUS☐ Mandatory GPS(CSC☐ §17-25-45

w/minor 1st or Lewd Act)

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTORNEY:

Stocum, Jeffrey Alan "Jay"

SC Bar# 100236

Defendant

Attorney for Defendant

SC Bar# 80294

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 20 days/months/years or ☐ under the Youthful Offender Act not to exceed years

and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment

of \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 2014-65-020079☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

* ~~Do not~~ Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ plus 20% fee: \$

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114 (DUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/cn	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ 5.00
3% to County (if paid in installments)	\$	\$ 3.90
TOTAL	\$	\$ 133.90

PTUP

days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐

Fine may be pd. in equal, consecutive weekly pmts. of \$ beginning

\$ paid to Public Defender

Other:

☐ Appointed PD or appointed other counsel,
 § 47.12 requires \$500 be paid to Clerk
 during probation.

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (03/2011)

Presiding Judge

Judge Code:

Sentence Date:

APPX 281

4/16/14

STATE OF SOUTH CAROLINA
 COUNTY OF AIKEN
 I, Clerk of Court, do hereby certify that the foregoing constitutes a true and correct copy of the original documents which have been filed in my office this 16th day of April 2014.
 C. C. C. G. S. Aiken County
 Deputy Clerk

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF
STATE

Aiken

VS.

John Lyndon Upson

AKA:

Race: Black

Sex: M

Age: 42

DOB:

SS#:

Address:

City, State, Zip:

DL#:

SID#:

*CDL Yes ☐ No ☒ CMV Yes ☐ No ☒ Hazmat Yes ☐ No ☒In disposition of the said indictment comes now the Defendant who was
TO: Kidnapping / Kidnapping

INDICTMENT/CASE#: 2014GS0200080

A/W#: 13-DI02-0106

Date of Offense: 11/27/2013

S.C. Code § : 16-03-0910

CDR Code #: 0095

SENTENCE SHEET

0-30 years

☒ CONVICTED OF or ☐ PLEADS

in violation of § 16-03-0910

of the S.C. Code of Laws, bearing CDR Code #

0095

☐ NON-VIOLENT☒ VIOLENT☐ SERIOUS☒ MOST SERIOUS☐ Mandatory GPS(CSC
w/minor 1st or Lewd Act)☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTORNEY:

Secum, Jeffrey Alan "Jay"

SC Bar# 100236

Defendant

Attorney for Defendant

SC Bar# 80294

WHEREFORE, the Defendant is committed to the

☒ State Department of Corrections,☐ County Detention Center,for a determinate term of 20 days/months/years or ☐ under the Youthful Offender Act not to exceed years

and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment

of \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:

2014-GS-020074

☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.*CDL No Sex offender registration
Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

PTUP

Total: \$ plus 20% fee: \$

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)

\$

§ 14-1-211(A)(1) (Conv. Surcharge)

\$100

\$

§ 14-1-211(A)(2) (DUI Surcharge)

\$100

\$

§ 56-5-2995 (DUI Assessment)

\$12

\$

§ 56-1-286 (DUI Breath Test)

\$25

\$

Proviso 47.9 (Public Def/Prob)

\$500

\$

§ 14-1-212 (Law Enforce. Funding)

\$25

\$

§ 14-1-213 (Drug Court Surcharge)

\$150

\$

§ 50-21-114(BUI Breath Test Fee)

\$50

\$

§ 56-5-2942(J) (Vehicle Assessment)

\$40/cn

\$

Proviso 90.5 (SCCA Surcharge)

\$5

\$

3% to County (if paid in installments)

\$

TOTAL

\$

133.90

days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling ☐

Random Drug/Alcohol testing

Fine may be pd. in equal, consecutive weekly

pmts. of \$ beginning

\$ paid to Public Defender

Other:

☐ Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk
during probation.

Clerk of Court/Deputy Clerk

Court Reporter:

SCCA/217 (03/2011)

Presiding Judge

Judge Code:

Sentence Date:

APPX 282

4/16/14

STATE OF SOUTH CAROLINA
COUNTY OF Aiken
I, Liz Godard, Clerk of Court of Common Pleas and Criminal Sessions for Aiken County, South Carolina, do hereby certify that the foregoing constitutes a true and correct copy of the original document which have been filed in my office this 16 day of April 2014.
Liz Godard
Clerk of Court
S.C. Code of Laws, Title 15, Chapter 1, Section 15-1-10

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Aiken
STATE VS.John Lyndon Upson

AKA:

Race: Black Sex: M Age: 42DOB: [REDACTED] SS#: [REDACTED]Address: [REDACTED]City, State, Zip: [REDACTED]DL#: [REDACTED] SID#: SC00926172*CDL Yes ☐ No ☒ CMV Yes ☐ No ☒ Hazmat Yes ☐ No ☒

In disposition of the said indictment comes now the Defendant who was

TO: Robbery / Armed Robbery, robbery while armed or allegedly armed with a deadly weaponINDICTMENT/CASE#: 2014GS0200074A/W#: 2013A0220101013Date of Offense: 11/27/2013S.C. Code § : 16-11-0330(A)CDR Code #: 0139

SENTENCE SHEET

10-30 years☒ CONVICTED OF or ☐ PLEADSin violation of § 16-11-0330(A) of the S.C. Code of Laws, bearing CDR Code # 0139☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.ATTEST: [Signature] 100236 [Signature] Andy Smith 80294
Storum, Jeffrey Alan "Jay" SC Bar# Defendant Attorney for Defendant SC Bar#WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 20 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years

and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment

of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ Set by SCDPPPS _____

Recipient: _____

*Fine: \$ _____

§ 14-1-206 (Assessments 107.5 %) \$ _____

§ 14-1-211(A)(1) (Conv. Surcharge) \$100 \$ 100.00

§ 14-1-211(A)(2) (DUI Surcharge) \$100 \$ _____

§ 56-5-2995 (DUI Assessment) \$12 \$ _____

§ 56-1-286 (DUI Breath Test) \$25 \$ _____

Proviso 47.9 (Public Def/Prob) \$500 \$ _____

§ 14-1-212 (Law Enforce. Funding) \$25 \$ 25.00

§ 14-1-213 (Drug Court Surcharge) \$150 \$ _____

§ 50-21-114 (BUI Breath Test Fee) \$50 \$ _____

§ 56-5-2942(J) (Vehicle Assessment) \$40/ea \$ _____

Proviso 90.5 (SCCJA Surcharge) \$5 \$ 5.003% to County (if paid in installments) \$ 3.90TOTAL \$ 133.90

PTUP

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐

Fine may be pd. in equal, consecutive _____

pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender _____

Other: _____

☐ Appointed PD or appointed other counsel, § 47.12 requires \$500 be paid to Clerk during probation.

Presiding Judge

Judge Code: 2167Sentence Date: 4/16/14

Clerk of Court/ Deputy Clerk

Court Reporter: Cheri Young

SCCA/217/03/2011

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
I, Liz Goggin, Clerk of Court of Common Pleas and General Sessions for Aiken County, South Carolina do hereby certify that the foregoing constitutes a true and correct copy of the original document which have been filed in my office this 16 day of April 2014.

Liz Goggin
Clerk of Court
C.C.P. & G.S. Aiken County, S.C.

[Signature]
Deputy Clerk

APPX 283

10:43:27 Wednesday, April 12, 2017

CMTI330D SCDC OFFENDER MANAGEMENT SYSTEM 04/12/17
OMCOMITA RELEASE DATE SCREEN C056427
SCDC# > 229134 LOC: MCCORMICK
UPSON, JOHN L SCDC CLASSIFICATION...: VIOLENT
OFFENDER TYPE...: ADULT-STRAIGHT SENTENCE SEXUAL REGISTRY...: N
SEXUAL PREDATOR...: NOT APP
DNA STATUS.....: COMPLETED
GPS REQUIREMENT...: N
PREA DECISION....:
PREA PERP...:
PREA VICTIM.....:
CURRENT SENTENCE: 020-00-000 CONSECUTIVE SENTENCE ...: N
020-00-000 CURRENT SENT START DATE: 12/02/2013
PROJECTED COMPLETION DATES
MAXOUT DATE: 11/28/2030 CURRENT EWC ..: 2 F 5
YOA SIX YEAR DATE: / / CURRENT EEC ..: B7
INITIAL PAROLE DATE: 00/00/0000 NEXT PAROLE HEARING DATE: 00/00/0000

TOTAL GT DAYS EARNED: 000000 LABOR CREW/WORK PROG DATE: 99/99/9999
TOTAL EARNED WORK CREDITS ...: 000432 LABOR CREW DISQ REASON:
TOTAL EDUCATION CREDITS: 000172 CATEGORY 4 OR 5 OFFENSE
TOTAL EXTRA EARNED CREDITS ..: 000 SUPERVISED REENTRY DATE...: 00/00/00
TOTAL SERVICE TIME EARNED ...: 001210 ISS.....:

PFKEYS: 5:HISTORY OF DATE CHANGES

South Carolina Department of Corrections

Classification Summary Reports

Date: Wednesday, April 12, 2017

Classification Summary Reports

Inmate Number **229134**

Submit

Classification Summary Report for UPSON, JOHN L :

Create PDF

CLASSIFICATION SUMMARY REPORT DATED 04/12/2017

SCDC# 00229134

UPSON, JOHN L

FBI# 33298VA2

OFFENDER TYPE: ADULT-STRAIGHT SENTENCE

INSTITUTION: MCCORMICK

SECURITY/CUST: 3 MINIMUM IN

CURR INCARC SENT: 20 YRS 0 MOS 0 DAYS

VICTIM WITNESS: SEPREQ:Y

MED CLASS: [REDACTED]

INST RESTRICT: DAILY NURSING COVERAGE

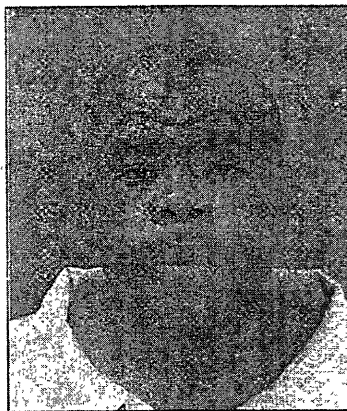
MENTAL CLASS: NMH (NO MENTAL HEALTH TRE

CURRENT PROGRAM: NO CURRENT PROGRAM

SEX REGISTRY: N

DNA: C

AGE: 45



RESIDENT STABILITY: NA

DORMROOMBUNK_CODE: F4 0278 B

PROJ MAXOUT DATE: 11/28/2030

PROJ PAROLE DATE: --

EWC JOB: FOOD SERVICE AIDE

ASSIGNMENT: CAFETERIA

EWC LEVEL: 2F5 EEC LEVEL:

EDUC PGM: CARPENTRY (ABE)

PREVIOUS NUMBERS:

00210225

CURRENT OFFENSES	SENTENCE				SENTENCE			
	YRS	MOS	DYS	COUNTY	START	V/NV	CAT	INDICT
KIDNAPPING	20	0	0	AIKEN	12/02/2013	V	5	14GS0200079
ARMED ROBBERY	20	0	0	AIKEN	12/02/2013	V	4	14GS0200074
COMPLETED OFFENSES	SENTENCE				SENTENCE			
	YRS	MOS	DYS	COUNTY	START	V/NV	CAT	INDICT
GRAND LARCENY	4	7	0	AIKEN	11/08/2004	N	2	02GS021314

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FORGERY	5	0	0	AIKEN	11/08/2004	N	2	03GS02-1915+
FINANCL TRANS CARD FRAUD	1	0	0	AIKEN	04/12/2002	N	2	01GS02273
GRAND LARCENY	0	5	0	AIKEN	04/09/2002	N	2	02GS021314
FORGERY	1	0	0	AIKEN	12/05/1995	N	2	94GS02443
CRACK POSSESS	5	0	0	AIKEN	12/05/1995	N	2	94GS02445
COMMON LAW ROBBERY	8	0	0	AIKEN	12/05/1995	N	3	95GS021064
FORGERY	5	0	0	AIKEN	12/05/1995	N	2	95GS021520
FORGERY	0	8	0	AIKEN	08/12/1995	N	2	0000000000

PRIOR COMMITMENTS OVER 90 DAYS:

03/29/2004	ARMED ROBBERY
02/26/2001	COUNTERFEITING ID OBJECT

PREVIOUS OFFENSES	PREVSCDCID	SENTENCE				START	SENTENCE		
		YRS	MOS	DYS	COUNTY		V/NV	CAT	INDICT
FORGERY	00210225	0	8	0	AIKEN	03/03/1994	N	2	0000000000

DETAINERS (HOLD,WANTED,NOTIFY):

NO DETAINERS

ESCAPES:

NO ESCAPE HISTORY

CRIMINAL CHARGES:

NO CRIMINAL CHARGES HISTORY

ASSAULTIVE DISCIPLINARIES:

NO ASSAULTIVE DISCIPLINARY HISTORY

PREVIOUS ASSAULTIVE DISCIPLINARIES:

NO PREVIOUS ASSAULTIVE DISCIPLINARY HISTORY

NON-ASSAULTIVE DISCIPLINARIES:

04/13/2016	EXHIBITIONISM AND PUBLIC MASTURBATION	DISMISSED	MAJOR DISC. HEARING
08/06/2015	DISRESPECT	CONVICTED	ADMINISTRATIVE RESOLUTION
02/08/2015	OUT OF PLACE	CLOSED	OTHER ACTION TAKEN/INFORM
10/16/2014	REFUSING OR FAILING OBEY ORDERS	DISMISSED	OTHER ACTION TAKEN/INFORM
08/02/2014	STEALING	DISMISSED	OTHER ACTION TAKEN/INFORM
07/21/2005	THREATENING TO INFLICT HARM ON EMPLOYEE	DISMISSED	MAJOR DISC. HEARING
07/21/1999	USE OBSCENE,VULGAR,PROFANE LANG/GESTURES	CONVICTED	MAJOR DISC. HEARING
06/03/1999	REFUSING OR FAILING OBEY ORDERS	DISMISSED	MAJOR DISC. HEARING
12/30/1998	REFUSING OR FAILING OBEY ORDERS	NOT GUILTY	MINOR DISC. HEARING
11/15/1998	REFUSING OR FAILING OBEY ORDERS	CONVICTED	MAJOR DISC. HEARING
10/29/1998	REFUSING OR FAILING OBEY ORDERS	CLOSED	OTHER ACTION TAKEN/INFORM
07/13/1998	REFUSING OR FAILING OBEY ORDERS	DISMISSED	MAJOR DISC. HEARING
07/13/1998	INCITING/CREATING A DISTURBANCE	DISMISSED	MAJOR DISC. HEARING
03/02/1998	INCITING/CREATING A DISTURBANCE	DISMISSED	MINOR DISC. HEARING
01/25/1998	FALSE STATEMENT TO HARM ANOTHER PERSON	CONVICTED	MAJOR DISC. HEARING
01/21/1998	USE,POSS NARC,MARIJ,UNAUTH DRUG,INHALANT	CONVICTED	MAJOR DISC. HEARING
12/03/1997	FALSE STATEMENT TO HARM ANOTHER PERSON	CONVICTED	MAJOR DISC. HEARING
12/03/1997	OUT OF PLACE	CONVICTED	MINOR DISC. HEARING

PREVIOUS NON-ASSAULTIVE DISCIPLINARIES:

NO PREVIOUS NON-ASSAULTIVE DISCIPLINARIES HISTORY

HISTORY OF MOVEMENTS:

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03/13/2017	MCCORMICK	INCARCERATED	ADMINISTRATIVE
03/13/2017	KIRKLAND	INCARCERATED	MEDICAL
11/02/2016	MCCORMICK	INCARCERATED	ADMINISTRATIVE
11/02/2016	KIRKLAND	INCARCERATED	MEDICAL
10/03/2016	MCCORMICK	INCARCERATED	ADMINISTRATIVE
10/03/2016	KIRKLAND	INCARCERATED	MEDICAL
08/31/2016	MCCORMICK	INCARCERATED	ADMINISTRATIVE
08/30/2016	KIRKLAND	INCARCERATED	MEDICAL
08/01/2016	MCCORMICK	INCARCERATED	ADMINISTRATIVE
08/01/2016	RICHLAND CO	AUTH ABSENCE (AWL)	MEDICAL
06/01/2016	MCCORMICK	INCARCERATED	ADMINISTRATIVE
06/01/2016	KIRKLAND	INCARCERATED	MEDICAL
05/20/2016	MCCORMICK	INCARCERATED	ADMINISTRATIVE
05/20/2016	RICHLAND CO	AUTH ABSENCE (AWL)	MEDICAL
04/27/2016	MCCORMICK	INCARCERATED	ADMINISTRATIVE
04/26/2016	KIRKLAND	INCARCERATED	MEDICAL
04/13/2016	MCCORMICK	INCARCERATED	ADMINISTRATIVE
04/13/2016	KIRKLAND	INCARCERATED	MEDICAL
03/24/2016	MCCORMICK	INCARCERATED	ADMINISTRATIVE
03/24/2016	KIRKLAND	INCARCERATED	MEDICAL
03/21/2016	MCCORMICK	INCARCERATED	ADMINISTRATIVE
03/21/2016	KIRKLAND	INCARCERATED	MEDICAL
03/10/2016	MCCORMICK	INCARCERATED	ADMINISTRATIVE
03/10/2016	RICHLAND CO	AUTH ABSENCE (AWL)	MEDICAL
01/06/2016	MCCORMICK	INCARCERATED	ADMINISTRATIVE
01/06/2016	KIRKLAND	INCARCERATED	MEDICAL
11/04/2015	MCCORMICK	INCARCERATED	ADMINISTRATIVE
11/04/2015	KIRKLAND	INCARCERATED	MEDICAL
09/29/2015	MCCORMICK	INCARCERATED	ADMINISTRATIVE
09/28/2015	KIRKLAND	INCARCERATED	MEDICAL
09/08/2015	MCCORMICK	INCARCERATED	ADMINISTRATIVE
09/08/2015	KIRKLAND	INCARCERATED	MEDICAL
09/01/2015	MCCORMICK	INCARCERATED	ADMINISTRATIVE
09/01/2015	KIRKLAND	INCARCERATED	MEDICAL
08/13/2015	MCCORMICK	INCARCERATED	ADMINISTRATIVE
08/13/2015	KIRKLAND	INCARCERATED	MEDICAL
08/05/2015	MCCORMICK	INCARCERATED	ADMINISTRATIVE
08/05/2015	KIRKLAND	INCARCERATED	MEDICAL
06/10/2015	MCCORMICK	INCARCERATED	ADMINISTRATIVE
06/03/2015	PERRY	INCARCERATED	ADMINISTRATIVE
06/02/2015	KIRKLAND	INCARCERATED	MEDICAL
04/23/2015	PERRY	INCARCERATED	ADMINISTRATIVE
04/23/2015	KIRKLAND	INCARCERATED	MEDICAL
04/01/2015	PERRY	INCARCERATED	ADMINISTRATIVE
04/01/2015	KIRKLAND	INCARCERATED	MEDICAL
01/15/2015	PERRY	INCARCERATED	ADMINISTRATIVE
01/15/2015	RICHLAND CO	AUTH ABSENCE (AWL)	MEDICAL
12/17/2014	PERRY	INCARCERATED	ADMINISTRATIVE
12/17/2014	KIRKLAND	INCARCERATED	MEDICAL
12/03/2014	PERRY	INCARCERATED	ADMINISTRATIVE
12/02/2014	KIRKLAND	INCARCERATED	MEDICAL
10/07/2014	PERRY	INCARCERATED	ADMINISTRATIVE

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10/07/2014	KIRKLAND	INCARCERATED	MEDICAL
06/02/2014	PERRY	INCARCERATED	ADMINISTRATIVE
04/25/2014	KIRKLAND	INCARCERATED	NEW ADMISSION
06/29/2007	UNK	RELEASE	EXPIRATION OF SENTENCE
04/25/2007	MANNING	INCARCERATED	ADMINISTRATIVE
04/25/2007	BROAD RIVER	INCARCERATED	COURT/PAROLE HEARING VIA
03/21/2007	MANNING	INCARCERATED	ADMINISTRATIVE
03/21/2007	PALMETTO RCHLAND	AUTH ABSENCE (AWL)	MEDICAL
03/20/2007	KIRKLAND INFRM	INCARCERATED	MEDICAL
01/17/2007	MANNING	INCARCERATED	ADMINISTRATIVE
08/25/2005	EVANS	INCARCERATED	LOCKUP-ADJUSTMENT COMM.
06/30/2005	KIRKLAND	INCARCERATED	ADMINISTRATIVE
11/08/2004	FEDERAL INST.	AUTH ABSENCE (AWL)	SERVING SC SENT IN OJ
11/23/2002	AIKEN CO	PROBATION	RELEASED TO PROBATION
09/23/2002	FEDERAL INST.	AUTH ABSENCE (AWL)	SERVING SC SENT IN OJ
09/23/1999	AIKEN CO	PAROLE	PAROLE BOARD ACTION
08/02/1996	RIDGELAND	INCARCERATED	ADMINISTRATIVE
12/27/1995	TURBEVILLE	INCARCERATED	ADMINISTRATIVE
12/05/1995	BROAD RIVER	INCARCERATED	RETURN FROM COURT
12/04/1995	AIKEN CO	AUTH ABSENCE (AWL)	TO COURT
09/22/1995	BROAD RIVER	INCARCERATED	ADMINISTRATIVE
08/28/1995	BROAD RIVER R&E	INCARCERATED	NEW ADMISSION

HISTORY OF EARNED WORK CREDIT ASSIGNMENTS:

JOB DESCRIPTION	START DATE	END DATE	TERMINATION REASON	JOB LVL
FOOD SERVICE AIDE	02/23/2017	-		2F5
BARBER	07/21/2015	02/22/2017	INMATE REQUEST	2F5
GENERAL WORKER	07/20/2015	07/20/2015	INMATE REQUEST	2F5
BARBER	06/24/2015	07/19/2015	INMATE REQUEST	2F5
GENERAL WORKER	06/16/2015	06/23/2015	INMATE REQUEST	2F5
WARDKEEPER ASSISTANT	05/21/2015	06/10/2015	INSTIT TRANSFER	2F5
WARDKEEPER ASSISTANT	03/20/2015	05/20/2015	INMATE REQUEST	2P5
GENERAL WORKER	11/05/2014	03/03/2015	LATERAL TRANSFER	2F5
WARDKEEPER ASSISTANT	09/04/2014	11/04/2014	INMATE REQUEST	2P5
FOOD SERVICE AIDE	06/26/2014	09/03/2014	LATERAL TRANSFER	2F5
WARDKEEPER ASSISTANT	06/03/2014	06/25/2014	LATERAL TRANSFER	2P5
GENERAL WORKER	01/23/2007	06/29/2007	RELEASED/PAROLED	2F5
CUSTODIAL WORKER	01/20/2006	01/17/2007	INSTIT TRANSFER	2F5
CUSTODIAL WORKER	11/18/2005	01/19/2006	MI ELIGIBLE FOR LEVEL 2	3F5
SENIOR GROUNDSKEEPER	02/02/1999	09/23/1999	RELEASED/PAROLED	5F5
LANDSCAPE GARDENER	10/30/1998	11/05/1998	UNSAT JOB PERFORM	2F5
LANDSCAPE GARDENER	10/29/1998	10/29/1998	CUSTODY REVIEW	3F5
SR TRAY LINE OPERATOR	02/12/1998	05/20/1998	UNSAT JOB PERFORM	3F5
RECREATION ASSISTANT	07/25/1997	12/10/1997	UNSAT JOB PERFORM	2F5
RECREATION ASSISTANT	07/02/1997	07/24/1997	MI ELIGIBLE FOR LEVEL 2	3F5
BARBER	11/15/1996	05/23/1997	UNSAT JOB PERFORM	2F6
BARBER	10/09/1996	11/14/1996	CUSTODY REVIEW	3F6
BARBER	08/26/1996	09/30/1996	REDUCTION IN FORCE	3F6
BARBER	08/09/1996	08/25/1996	PROMOTION	3F6
BARBER	05/07/1996	08/02/1996	INSTIT TRANSFER	3F5
GENERAL WORKER	03/05/1996	05/06/1996	LATERAL TRANSFER	7F7
FOOD SERVICE AIDE	10/04/1995	11/03/1995	UNSAT JOB PERFORM	5F7

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HISTORY OF EARNED EDUCATION CREDITS:

EEC DESCRIPTION	START DATE	END DATE	TERMINATION REASON
BONUS 15 OR MORE	07/05/2016	-	
BONUS 15 OR MORE	08/03/2015	07/01/2016	COMPLETED EDUC PROGRAM
LVL 7 - FULL TIME(NO EWC)	11/29/1995	12/27/1995	INSTIT TRANSFER

***** END OF REPORT *****

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APP'X 289

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHN LYNDON UPSON,

APPELLANT

APPELLATE CASE NO. 2014-000852

FINAL BRIEF OF APPELLANT

JOHN H. STROM
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

I.

Did the trial err by refusing to grant a directed verdict acquitting Appellant of armed robbery where there was no substantial circumstantial evidence that money was stolen from the restaurant and where there was no substantial circumstantial evidence that money belonging to the restaurant was forcibly taken from Devin Johnson as alleged in the armed robbery indictment?

II.

Did the trial court err by refusing to grant a directed verdict on Appellant's indictments for kidnapping Scott Hall and Jameshia Alston because the kidnappings were incidental to the employees' confinement during the armed robbery; such that an acquittal on the armed robbery charge, necessitates an acquittal on the kidnapping charges?

STATEMENT OF THE CASE

On January 9, 2014, the Aiken County Grand Jury indicted Appellant, John Upson, for one count of armed robbery and two counts of kidnapping. R. 189. On April 15, 2014, Appellant proceeded to trial before the Honorable Donald B. Hocker and a jury.

Andrew Smith and De Grant Gibbons represented Appellant. Assistant Solicitors Jeffery Alan Slocum and Kevin R. Molony represented the State. The jury found Appellant guilty as charged. R. 181, ll. 16 – R. 182, ll. 3. The trial court sentenced Appellant to twenty years imprisonment with all three counts to run concurrent. R. 188, ll. 1-5.

STATEMENT OF FACTS

On November 27, 2013 at 10 p.m., Scott Hall was taking out the trash at the rear entrance of of the Captain D's Seafood restaurant in Aiken, South Carolina when two masked men approached him. R. 37, ll. 4-24. One of the men held a gun to his head and forced him back into the restaurant. R. 38, ll. 1-25.

Two other employees, manager Devin Johnson and cashier Jameshia Alston, were also at the restaurant during the incident. Alston was counting a cash drawer when the masked men entered and ordered her into the walk-in refrigerator. R. 12, ll. 14-23. Hall led the gunman to the cash register area while the second masked man stood at the door of the refrigerator. R. 39, ll. 1-15. Hall was then told to lay face down on the ground by the safe. R. 43, ll. 11-23.

Amazingly, Johnson was near the restaurant safe during the incident, but, his actions during this time are unknown as he was not called to testify at trial. Hall allegedly overheard the gunman telling Johnson to "give me the money, I don't want the damn coins." R. 43, ll. 19-23. Hall and Johnson were then taken to the refrigerator and the two masked men fled. Alston and Hall believed the incident lasted about two to three minutes. R. 49, ll. 19-23. Johnson called 911 once he left the refrigerator. R. 50, ll. 1-10.

Armed Robbery Indictment

Appellant was indicted for armed robbery on January 9, 2014. The indictment specifically alleged that Appellant "along with another, did . . . while armed with a deadly weapon . . . feloniously take from the person or presence of Devin Johnson by means of force or intimidation goods or monies of Captain D's, such goods of monies being described as follows: U.S. currency. . ." R. 189.

Devin Johnson

Despite being named as the individual who had money “feloniously taken from” him by force in the armed robbery indictment and being subpoenaed by the State, Johnson was never called to testify. In addition, the State withdrew Appellant’s kidnapping indictment for Johnson before trial. R. 77, ll. 3-8. Johnson was the only employee who claimed that he had a good look at the gunman and the only employee who believed that he would be able to identify the gunman. R. 75, ll. 5-24.

During the investigation of the robbery, Johnson was questioned concerning an individual named Ishmael Norid-Deen, whom the police identified was a mutual acquaintance of Appellant and Johnson. R. 66, ll. 4-8. Norid-Deen had worked at that Captain D’s location. R. 75, ll. 22-25. Johnson was shown a photograph of Norid-Deen. Unsurprisingly, Johnson denied that Norid-Deen was the gunman. *Id.* at ll. 14-21. A subsequent police search of Johnson’s phone records divulged that Johnson called Norid-Deen several times on the night of the incident from his cell phone and from the restaurant phone. R. 80, ll. 21 – R. 81, ll. 6. Johnson allegedly explained to law enforcement that he was simply calling Norid-Deen to get a ride home from work as they both lived in the same neighborhood. *Id.* For reasons unknown, Johnson was the only employee shown Norid-Deen’s photograph. R. 75, ll. 14-21.

At trial, lead detective William Royster reluctantly exposed on cross-examination that Johnson was interviewed by law enforcement as recently as the day before Appellant’s trial about his suspected role in the incident. R. 80, ll. 19-24. Nevertheless, Royster adamantly denied that he thought Johnson may have been involved in the alleged robbery. R. 79, ll. 16 – R. 80, ll. 8. Curiously, despite rigorously investigating and interrogating Johnson, Royster was never able to determine whether any money was taken from the restaurant. *Id.* This is especially odd given that

Johnson was the manager and presumably responsible for making final count of receipts and reconciling sales with revenue.

Jameshia Alston

At trial, Alston testified that she feared for her life during the alleged robbery. R. 17, ll. 17-19. Alston claimed that after the robbery, on her own initiative, she visited co-worker William Keel's Facebook account and looked through his "friends list." R. 15, ll. 2-10. Keels was not working the night of the robbery. From that list she allegedly recognized Appellant as the masked and hooded suspect who guarded the refrigerator door during the two and an half minute robbery. R. 19, ll. 4-21.

Alston claimed that she began her investigation because she believed that she had previously seen Appellant in Captain D's the week before the robbery. During this alleged visit, Appellant ordered a Sprite and took a photograph of Keels. R. 14, ll. 15-24; R. 23, ll. 18-23. When questioned on her remarkable memory on cross-examination, Alston assured the court it was her job to "remember by my customers." R. 16, ll. 1-4. She also identified Appellant's bald head and his alleged lazy eye with the masked suspect's appearance. *Id.*

Alston initially denied that she had been shown a photographic lineup by police. R. 33, ll. 20 – R. 33, ll. 1. However, when pressed, she admitted that the police had provided her with a list of names, which included Appellant's, during the course of the investigation. *Id.* When asked about the alleged robbery, Alston also conceded that she never completed her count of the cash drawer and never deposited the money in the safe. R. 17, ll. 1-14. Alston testified that she did not know if any money was taken from the restaurant. *Id.* Like Johnson, Keels was never called to testify. R. 161, ll. 18 – R. 162, ll. 5.

With respect to Alston's identification, William Royster conceded on cross-examination, that it was made while she was still upset by the robbery and that he did not like having witnesses do independent work. R. 68, ll. 2 – R. 69, ll. 20; R. 75, ll. 2-4. Royster admitted that her identification was the key to his investigation. R. 67, ll. 6 – R. 68, ll. 6.

Scott Hall

On direct examination Hall testified that he was led to the front of the store by the gunman and asked him to lie on the ground. R. 49, ll. 1-12. Hall alleged that that he saw Johnson open the safe and the gunman grab a carry-out bag. R. 43, ll. 19-25. When prompted Hall claims that a photograph of the area around the restaurant safe is "where the money was taken." R. 49, ll. 6-7. However, Hall also claimed that he kept his head down, which prevented him from seeing the interaction between Johnson and the gunman. R. 39, ll. 4-15.

Under cross-examination, Hall conceded that he did not see any money change hands and that he could not see the safe during the alleged robbery. R. 52, ll. 13 – R. 53, ll. 25. Further, Hall admits that he did not know if any money had in fact been taken from the restaurant and that the safe was simply open when he left the refrigerator. *Id.* Hall confirmed that it was his responsibility to make a nightly count of the money left over at the end of the day, but that he simply did not know if any money had been taken that night. R. 57, ll. 2-14.

Hall was never shown a photographic lineup and did not believe that he would be able to recognize either of the masked men if he saw them again. *Id.* When addressing the relative sizes of the men, he believed that the gunman was shorter than the individual alleged to be Appellant. R. 45, ll. 5-10. Hall also believed that the suspect identified by Alston as Appellant was around six feet tall, as he recalled that the man was taller than he was. *Id.* Appellant is five feet seven inches tall. *Id.*

William Keels

As detailed above, Keels was a restaurant employee, but was not working when the robbery occurred. Keels did not testify. However, Keels' mother was a friend with Appellant's and Keels and Appellant were Facebook friends. R. 31, ll. 4 – R. 32, ll. 24. According to Alston, Keels was working several weeks prior to the incident when Alston claimed that Appellant allegedly visited the restaurant to buy a Sprite and took a picture of Keels. R. 14, ll. 15 – R. 15, ll. 10. During the course of the investigation Keels' mother was arrested on a charge of misprision of a felony. R. 65, ll. 3-18.

William Royster

As Johnson was never called to testify by the State, instead William Royster testified extensively on his investigation and the potential role Johnson may have played in the incident. R. 58, ll. 7-23. At trial, Royster testified that the Captain D's had no working video surveillance and that none of the surrounding buildings had cameras that captured the alleged robbery. R. 59, ll. 23 – R. 60, ll. 9. Both masked men were believed to be wearing gloves and no fingerprints of interest were recovered from the restaurant. R. 60, ll. 10-13.

Royster issued an arrest warrant for Appellant after receiving an email from Alston about her investigation on Facebook. *Id.* at ll. 14-25. Royster recalled speaking with Appellant over the phone, where Appellant stated that he was at a comedy show in downtown Aiken during at the time of the robbery. R. 62, ll.13-24. At Appellant's suggestion, Royster obtained Appellant's phone records and also confirmed that there was a comedy show on the night in question. R. 63, ll. 9 – R. 64, ll. 15. The comedy show was scheduled to end around 11 p.m. with an after-party at the Hotel Aiken. R. 64, ll. 2-18.

Royster admitted that the State had no suspects as to who the actual gunman might have been. *Id.* at ll. 19-24. Incongruously, Royster emphatically denied that Johnson, the Captain D's manager who did not testify at trial, but was listed as the victim on the indictment, was a suspect. *Id.* at ll. 19-25. Royster testified that there was a substantial amount of money left in the safe after the masked men fled. *Id.* at ll. 10-12. Royster admitted that as late as the day before Appellant's trial, he and other detectives had been interviewing Johnson about his possible involvement; including accusing him of having planned the robbery. R. 79, ll. 16 – R. 80, ll. 8.

Nevertheless, when confronted on cross-examination Royster maintained that he was absolutely sure Johnson was not involved. R. 76, ll. 22-24. In support of his determination of Johnson's innocence, Royster repeatedly stated that the safe at the restaurant had a lot of money in it after the robbery. R. 77, ll. 10-12; R. 80, ll. 6-8. Royster never testified that any of the employees told him money was missing from the register or the safe and there was never an accounting done to determine if any money was actually taken. Finally, Royster was unable to explain why the indictment for kidnapping Johnson had been pulled. *Id.*

Directed Verdict Motion

At the close of the State's case, the defense moved for a directed verdict on the grounds that the State presented no credible evidence that Appellant was guilty of either the kidnapping or the robbery. R. 110, ll. 14-24. With regards to the armed robbery, the defense argued that there was no testimony that money had been taken from the restaurant. *Id.* The defense emphasized that the State never called Devin Johnson to testify, despite the armed robbery indictment alleging Appellant "along with another did . . . feloniously take from the person or presence of Devin Johnson by means of force or intimidation goods or monies of Captain D's". R. 111, ll. 1-4; R. 189.

The State countered that Hall's testimony about the gunman saying "put the money in the bag," was sufficient evidence of the robbery. *Id.* at ll. 11-14. The court noted that it "had some concern with the evidence related to the issue of money." R. 112, ll. 10-15. The court stated that Alston testified that she was in the process of counting her register, but that she did not say what happened to the money; simply that she did not count it. *Id.* at ll. 16-25.

The court continued, "*circumstantially money in the cash drawer goes into the safe. . . . [I]t's corroborated by Scott Hall's testimony.*" R. 113, ll. 18-22 (*emphasis added*). The defense interposed that Alston never stated that any money was missing from her drawer. R. 114, ll. 2-7. Turning to Hall's testimony the court noted that he initially stated that he saw the gunman taking money out of the safe, but on cross-examination, he corrected his story and stated that he was face down on the floor and did not see the gunman take any money. *Id.* at ll. 9-24. The State then interjected that there was also testimony that the cash drawer from the register was on the floor after the robbery. *Id.*

The court concluded that sufficient circumstantial evidence of the robbery existed based on the gunman's alleged statement and the empty cash drawers to survive the directed verdict motion for armed robbery. R. 115, ll. 14 – R. 116, ll. 12. The court believed it was a close case, but the any contradictions went to the weight of Hall's testimony not whether any substantial circumstantial evidence of the armed robbery existed. R. 116, ll. 2-8.

Defense Alibi Witnesses

In its case in chief, the defense presented a series of witnesses that all testified that Appellant was at the comedy show and the after party. The witnesses ranged from family friends of the Appellant to an DSS employee and a veteran correctional officer who was also a criminal justice instructor at a community college. R.136, ll. 20 – R. 137, ll. 2; R. 145, ll. 5-24. All the witnesses

testified that the show was supposed to start at eight, but that it did not start until nine. R. 129, ll. 2 – R. 131, ll. 16. The show also ran late, lasting until about ten thirty or quarter to eleven. R. 140, ll. 1-11. The robbery took place around ten p.m. R. 11, ll. 9-21.

All of the witnesses testified that Appellant was acting normally. Appellant helped prepare the venue for the show and was in a good humor before and after the comedy show. R. 129, ll. 2 – R. 131, ll. 16. Specifically, Janet Williams, who had recently lost a relative, recalled that Appellant had comforted her and made jokes after the show in an attempt to lift her spirits. R. 143, ll. 1-3. On cross-examination, none of the witnesses could recall seeing Appellant during the show, but the overhead lights were off during the performances and the venue was at or over capacity. R. 139, ll. 14 – R. 141, ll. 21.

At the close of the case, the defense renewed its directed verdict motions, which were denied. R. 149, ll. 10-17. The jury was only charged on armed robbery, the trial court did not provide a jury instruction on attempted armed robbery. R. 180, ll. 1-20. Once the jury returned guilty verdicts on all the indictments, the defense again renewed its directed verdict and made a motion for a mistrial. All three motions were denied.

ARGUMENT

I.

The trial court committed reversible error in refusing to grant a directed verdict of acquittal where: the evidence failed to prove an element of armed robbery as alleged in the Indictment; the evidence presented merely raised the suspicion of Appellant's guilt; and the State failed to present substantial circumstantial evidence that Appellant's was guilty of committing an armed robbery.

Discussion

Appellant was entitled to a directed verdict on the indictment for armed robbery as the State failed to present evidence any substantial circumstantial evidence that money or goods belonging to Captain D's were forcibly taken by Appellant from the person or presence of Devin Johnson.

Our Supreme Court has held that when reviewing a trial judge's refusal of a defendant's motion for a directed verdict, that it is required to consider "not whether there is 'any' evidence to support the conviction, but whether viewing the evidence in the light most favorable to the prosecution, there is sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt." *State v. Stewart*, 278 S.C. 296, 295 S.E.2d 627, 632 (1982), citing *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979). *See, also, State v. Asbury*, 328 S.C. 187, 493 S.E.2d 349 (1997). The accused is entitled to a directed verdict when the State fails to present evidence to support every element of the charged offense. *See State v. Brown*, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004); *see also State v. Bostick*, 392 S.C. 134, 708 S.E.2d 774 (2011).

When considering a motion for directed verdict of acquittal, "the trial court is concerned with the existence or non-existence of evidence, not its weight." *Brown*, 360 S.C. at 586, 602 S.E.2d at 395. "When the State fails to produce *substantial circumstantial evidence* that the defendant committed a particular crime, the defendant is entitled to a directed verdict." *State v. Odems*, 395 S.C. 582, 720 S.E.2d 48 (2011) (*emphasis added*). In *Odems*, the Court cited *State*

v. *Bostick*, 392 S.C. 134, 708 S.E.2d 774 (2011) and *State v. Lollis*, 343 S.C. 580, 541 S.E.2d 254 (2001) as “jurisprudence . . . instructive in explaining the proof required in cases built wholly on circumstantial evidence.” *Id.* Specifically, the trial court “should grant a directed verdict motion when the evidence *merely raises a suspicion* that the accused is guilty.” *Odems*, 395 S.C. at 586, 720 S.E.2d at 50 (emphasis added) (citation omitted).

“Suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof.” See *State v. Buckmon*, 347 S.C. 316, 322, 555 S.E.2d 402, 404-05 (2001) (citing *Lollis*, 343 S.C. 580, 541 S.E.2d 254). Therefore, a case based solely upon circumstantial evidence should be submitted to the jury only “if there is any substantial circumstantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced.” *Bostick*, 392 S.C. at 139, 708 S.E.2d at 776-777 (citing *State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)).

Appellant was indicted for armed robbery under S.C. Code Ann. § 16-11-330. South Carolina's statutory scheme specifies that the definition of robbery is to be provided by common law. See S.C. Code Ann. § 16-11-325 (2003). At common law, robbery is defined as larceny with force. *State v. Al-Amin*, 353 S.C. 405, 425, 578 S.E.2d 32, 43 (Ct. App. 2003) citing *Broom v. State*, 351 S.C. 219, 220-211, 569 S.E.2d 336, 337 (2002). Larceny is the felonious taking and carrying away of good of another against the owner's will and without the owner's consent. *Id.* The requisite elements of larceny are met at the point *when a thief possesses an item of stolen property*. See *State v. Keith*, 283 S.C. 597, 598, 325 S.E.2d 325, 326 (1985) (“asportation is an element of robbery and armed robbery.”)(*emphasis added*).

Accordingly, “[t]he gravamen of a robbery charge is a *taking from the person or immediate presence of another by violence or intimidation*.” *State v. Rosemond*, 356 S.C. 426, 430, 589

S.E.2d 757, 758–59 (2003) (citing *State v. Hiott*, 276 S.C. 72, 276 S.E.2d 163 (1981))(emphasis added). It is the use or alleged use of a deadly weapon that distinguishes armed robbery from robbery, and the employment of force or threat of force that differentiates a robbery from a larceny. See *Scipio* 283 S.C. at 126, 322 S.E.2d at 16.

“When determining whether the robbery was committed with intimidation, the trial court should determine **whether an ordinary, reasonable person in the victim's position would feel a threat of bodily harm from the perpetrator's acts.**” *Rosemond*, 356 S.C. at 430, 589 S.E.2d at 759 (emphasis added). Therefore, in order to survive a directed verdict motion, the State must present direct or substantial circumstantial evidence that Appellant carried away the money or goods of another against the owner's will while armed or while alleging to be armed. *State v. Parker*, 351 S.C. 567, 571 S.E.2d 288 (2002).

The evidence presented by the State merely raised the suspicion of Appellant's guilt, as the State failed to present evidence any substantial circumstantial evidence that money or goods belonging to Captain D's were forcibly taken by Appellant from Devin Johnson. The indictment for armed robbery specifically stated:

[Appellant] along with another, did in Aiken County on or about November 27, 2013, while armed with a deadly weapon or while alleging either by action or words that he was armed while using a representation of a deadly weapon or an object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, to wit: a handgun, ***feloniously take from the person or presence of Devin Johnson by means of force or intimidation goods or monies of Captain D's....***

R.189. Devin Johnson never testified as to whether money or goods were taken from him by force because the State never called him to testify. He was subpoenaed to testify and had even been interviewed by Royster and his partner the day before trial. R. 77, ll. 2-19. Instead of Johnson,

Detective Royster had to explain his investigation of Johnson and to try to justify why the individual named as the victim in the armed robbery indictment was not testifying. R. 75, ll. 5 – R. 78, ll. 21.

While adamantly affirming that Johnson was not suspected of involvement in the alleged robbery, Royster admitted that the kidnapping indictment related to Johnson had been withdrawn and that police had interrogated Johnson as recently as the day before Appellant's trial. R. 77, ll. 3-8. Royster also claimed that he did not consider Johnson a suspect because the gunman had left a substantial amount of money in the safe. *Id.* at ll. 10-12. Royster did not elaborate on why he thought this particular detail was important or how it led him to determine that Johnson was not involved in the robbery. Royster was unable to state whether any money was taken from the restaurant and there was no testimony as to whether any money was forcibly taken from Johnson or in his presence.

With respect to Scott Hall's testimony, the trial court overstated the discrepancy in his testimony. On direct examination Hall testified that he saw Johnson open the safe and the gunman grab a carry-out bag. R. 43, ll. 19-25. However, Hall also stated that he was ordered to keep his head down, which prevented him from seeing the interaction between Johnson and the gunman. R. 39, ll. 4-15. On cross-examination, Hall simply clarified the contradiction in his earlier testimony by affirming that he was "on all fours. *Like [in] a crawling position as well with my head, like, down*" R. 52, ll. 18-19 (*emphasis added*).

When asked by defense counsel if his head was "tucked down", Hall responded affirmatively. *Id.* at ll. 20-21. When asked if he could not see the safe, Hall responded that he could not. *Id.* at ll. When asked if he saw any of the money supposedly being taken from Johnson, he said that he did not. R. 52, ll. 22 – R. 53, ll. 4. On re-direct examination, Hall affirmed that the incident happened in two to three minutes and that he only had a few seconds to view the two masked men.

R. 56, ll. 2-18. Moreover, whether on direct or cross-examination, Hall never testified that he saw money forcibly taken from Johnson. Finally, the only other witness to the alleged armed robbery, Jameshia Alston, testified that she never saw the gunman take any money and never claimed that she knew any money was missing after the masked suspects fled. R. 17, ll. 1-14.

Accordingly, the evidence relied upon by the State does not amount to substantial circumstantial evidence reasonably tending to prove Appellant's guilt, or from which his guilt may be fairly and logically deduced. *See Bostick*, 392 S.C. at 139, 708 S.E.2d at 776-777. Therefore, the trial court erred in refusing to grant a directed verdict on Appellant's indictment for armed robbery where the evidence merely raised the suspicion of Appellant's guilt, and the State failed to present substantial circumstantial evidence that money or goods from Captain D's restaurant were taken by force from or in the presence of store manager Devin Johnson.

II.

The trial court erred by refusing to grant a directed verdict on Appellant's indictments for kidnapping Scott Hall and Jameshia Alston because the kidnappings were incidental to the employees' confinement during the armed robbery; such that an acquittal on the armed robbery charge, necessitates an acquittal on the kidnapping charges.

Appellant was indicted by the Aiken County Grand Jury two counts of kidnapping. R. 191.

The body of the kidnapping indictments are identical:

That [Appellant] did in Aiken County on or about November 27, 2013, unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away [Jameshia Alston/ Scott Hall] without authority of law, all in violation of §16-3-910 of the Code of Laws of South Carolina (1976), as amended.

Id. As previously discussed, the evidence presented by the State at trial alleged that Appellant along with an unknown gunman committed an armed robbery at a restaurant while Alston, Hall, and Johnson were working. R. 37, ll. 4-24.

In the course of the armed robbery, the gunman restrained Alston and Hall at gunpoint and directed them into the standup refrigerator. R. 12, ll. 14-23. The entire incident lasted only a few minutes. R. 49, ll. 19-23. Alston's implausible identification of Appellant, when viewed in a light most favorable to the State, placed Appellant unarmed at the door of the refrigerator. R. 39, ll. 1-15A. As detailed at length, Johnson's behavior and actions during the alleged robbery are unknown and the indictment charging Appellant in his kidnapping, was withdrawn by the State. . R. 7, ll. 3-8.

The joinder of Appellant's charges into a single trial was proper *State v. Carter*, 324 S.C. 383, 386, 478 S.E.2d 86, 88 (Ct. App. 1996) (joinder of offenses in one trial is "proper if the offenses (1) are of the same general nature or character and spring from the same series of transactions, (2) are committed by the same offender, and (3) require the same or similar proof"). However, as Appellant is entitled to direct verdict with respect to the armed robbery indictment

based on the State's failure to present substantial circumstantial evidence that money belonging to Captain D's was forcibly taken from Devan Johnson; Appellant is likewise entitled to a directed verdict on the kidnapping indictments as the force used to confine Hall and Alston was incidental to the alleged armed robbery of their employer.

This case is distinguishable from *State v. Porter*, 389 S.C. 27, 698 S.E.2d 237 (Ct. App. 2010), as Hall and Alston were employees of Captain D's, who were confined in the course of their employment. Consequently, the force used to confine Hall and Alston is inextricably tied to the force used to feloniously take money belonging to Captain D's. In *Porter* several of the indictments involved the confinement of customers. 389 S.C. at 40, 698 S.E.2d at 224. This Court concluded, the "act of confining the customers would support the kidnapping conviction independently of the confinement required to commit the armed robbery." *Id.*

Accordingly, as the trial court erred in refusing to grant a directed verdict on Appellant's indictment for armed robbery, Appellant is also entitled to directed verdict on the kidnapping indictments because the confinement of Hall and Alston was incidental to the armed robbery of their employer.

CONCLUSION

Based on the foregoing reasons, Appellant John Upson respectfully requests that this Court issue an Order of Acquittal on his convictions.

Respectfully submitted,

A handwritten signature in black ink, appearing to be "John H. Strom", written over a horizontal line.

John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of August, 2015.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

August 11th, 2015



John Harrison Strom
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1330

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County
Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

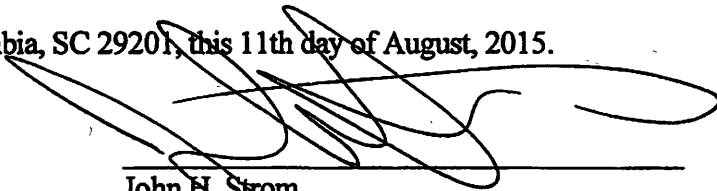
JOHN LYNDON UPSON,

APPELLANT

APPELLATE CASE NO. 2014-000852

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 11th day of August, 2015.



John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 11th day of August, 2015.


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: May 12, 2025.

APP'X 312

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2014-000852

THE STATE, ...RESPONDENT

v.

JOHN LYNDON UPSON, ...APPELLANT.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General
S.C. Bar No. 1871

Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

J. STROM THURMOND
Solicitor, Second Judicial Circuit

P.O. Drawer 3368
Aiken, South Carolina 29802
(803) 642-1557

ATTORNEYS FOR RESPONDENT

APP'X 313

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RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

I.

Did the trial court properly deny Appellant's motion for a directed verdict on the armed robbery charge when testimony of witnesses present during the incident and other evidence constituted substantial circumstantial evidence establishing that the assailants took money during the armed robbery and when the motion advanced by Appellant required the trial court to improperly weigh the evidence rather than consider the existence of the evidence?

II.

May this Court consider the issue Appellant presents of trial court error in the denial of his motion for a directed verdict respecting the kidnapping charges when the ground advanced on appeal was not presented to or ruled upon by the trial court; nevertheless, the trial court properly denied Appellant's motion for directed verdict on both kidnapping charges based upon direct, eyewitness testimony of the victims.

STATEMENT OF THE CASE

Appellant was indicted on January 9, 2014, by the Aiken County Grand Jury, for one count of armed robbery (2014-GS-02-74) and two counts of kidnapping (2014-GS-02-79 and 2014-GS-02-80). He was represented by Andrew Smith and De Grant Gibbons, and the State was represented by Assistant Solicitors Jeffery Alan Slocum and Kevin R. Molony. On April 15-16, 2014, Appellant proceeded to trial by jury pursuant to which Appellant was found guilty as charged. He was sentenced by the Honorable Donald B. Hocker to twenty years' imprisonment with all three sentences to run concurrently.

Appellant timely filed a notice of appeal and subsequently submitted a brief. This brief of Respondent follows.

STATEMENT OF FACTS

On November 27, 2013, Scott Hall, a cook employed at Captain D's restaurant, was taking out the trash at the rear entrance of the restaurant when two masked men approached dressed in black and wearing bandanas and surgical gloves. One of the two men had a gun and pressed the gun against Hall's head before Hall could get inside. The two men directed Hall inside and told Hall to take them to the front of the restaurant to the safe. Hall complied with the demands. (R. pp. 15; 37 - 38). Hall testified that he was forced "up front" by the gunman while the gun was still held against Hall's head. (R. 39). Hall was very frightened. (R. p. 39). Manager Devin Johnson was at the front of the restaurant at the time. (R. p. 51). Johnson was the only person with access to the safe. (R. p. 51). After forcing Hall to the front of the restaurant with the gun to Hall's head, the gunman instructed Hall to get on all fours, and look down. (R. p. 39; 52). Hall heard the gunman demanding that the manager Devin Johnson give the gunman money. (R. p. 39). Hall heard Johnson fumble a couple of times getting the safe open. (R. p. 43). During the exchange between the gunman and Johnson, Hall heard the gunman tell Johnson to give him the cash but not the coins. (R. 39; 49). Specifically, the gunman said, "Give me the money, I don't want the damn coins." (R. 43). Hall also stated that the gunman put the money in one of the restaurant "take-out" bags that the gunman grabbed as he walked to the front of the restaurant. (R. 43; 94). Hall described that after the gunman "had gotten the money and everything," the gunman directed Hall to stand with his arms over his head. (R. 43 - 44). Hall specifically testified that the gunman received money from Johnson after Johnson "fumbled with it a couple times to get the safe open." (R. 43). Hall stated that after taking the money and while holding the gun to the back of Hall's head, the gunman directed Hall into the "cooler" where employee Jameshia Alston already

stood. (R. p. 44; 49; 53). Hall did not feel free to leave. (R. p. 44). The assailants searched Alston, Hall and Johnson's pockets for anything they had and took Johnson's cell phone. (R. p. 12; 76; 80). Hall remained in the cooler for approximately five minutes. (R. p. 44; 49; 53). Hall was frightened and did not feel he was free to leave. (R. 44). Hall said the robbery lasted a few minutes. (R. 49; 56). Hall testified that money was missing from the safe that night and he had to count the money left in the drawers. (R. p. 56 – 57; 77). When the assailants were gone, Johnson called the police. (R. pp. 49 – 50). Hall provided descriptions of the assailants, including the fact that the gunman had a teardrop tattoo or birthmark under his eye. (R. 45). The police arrived shortly thereafter, took statements and began their investigation. Photographs were introduced of the cash drawers, coins, and areas involved. (State's exhibits 1-12 on file).

Two other employees, manager Devin Johnson and cashier Jameshia Alston were inside the restaurant when the two assailants entered with Hall at gunpoint at around 10:15 p.m. (R. p. 11). Alston was located at the back of the restaurant counting her cashier's drawer down to one hundred and fifty dollars before placing the money and cashier's drawer in the safe as she did every evening she worked. (R. p. 11 – 12; 16 - 17). Alston started that process at around 10:00 p.m. when the restaurant closed. (R. 11; 23). Alston observed the armed assailant enter the restaurant holding a gun held to Hall's head and heard the assailant direct Hall to go to the safe. (R. 12). A second, unarmed assailant who entered with the armed assailant went to Alston's location and told her to "stand right here. Don't move." Alston asked to go home and the assailant responded, "No, stay right here." (R. 12). Alston was fearful of the two assailants and described them as forceful and demanding. (R. 18). She did as she was told. (R. p. 12). Alston recognized

the unarmed assailant standing with her as the person she saw at the restaurant two days earlier with another employee. Alston recalled the order the unarmed assailant placed for a large drink as well as the fact that he and another employee took a photograph together. (R. pp. 14– 16; 23; 28). After making Alston remain at the back of the restaurant, the unarmed assailant whom Alston identified as Appellant during the trial then walked Alston to a location near the “stand-up refrigerator” – or “cooler” - where he kept her for a minute before forcing her inside. (R. pp. 12, 18; 22). Alston complied. (R. p. 12). Alston believed she could not leave and she feared for her life. (R. p. 16). Alston remained in the cooler until after the armed robbery. (R. p. 18). Alston informed the officers who responded to the scene that she recognized Appellant but did not know his name. (R. pp. 19; 25). Within one hour of leaving the restaurant after the incident, Alston researched Facebook photographs and found the photograph taken at the restaurant. Alston called officers with the name she discovered and forwarded the photographs. (R. pp. 19 – 20; 30 – 32; 35; [State’s Exhibits 1 – 12]).

Officer Royster testified that Johnson was not a suspect because he left some money in the safe during the armed robbery, had a sufficient explanation for suspicious calls, and had his cell phone stolen during the armed robbery. (R. p. 65; 76-77; 80-81; 91-92). Photographs introduced depict the scene, coins and safe. (R. p. 59; State’s exhibits 1 – 12).

ARGUMENTS

I.

The trial court properly denied Appellant's motion for a directed verdict respecting the armed robbery charge when testimony of witnesses present during the incident and other evidence introduced constituted substantial circumstantial evidence establishing that the assailants took money during the armed robbery and when the motion advanced by Appellant required the trial court to improperly weigh the evidence rather than consider the existence of the evidence.

Appellant argues the trial court erred in denying his motion for directed verdict respecting the armed robbery charge arguing the State failed to present evidence establishing that money or goods belonging to Captain D's was forcibly taken from the manager, Devin Johnson, because Johnson was not called as a witness at trial. The State submits that a review of the evidence presented and the reasonable inferences arising from that evidence taken in the light most favorable to the State reveals the trial court properly declined to direct a verdict of acquittal in Appellant's favor.

"When ruling on a directed verdict motion, the trial court is concerned with the existence or nonexistence of the evidence, not its weight. State v. Weston, 367 S.C. 279, 625 S.E.2d 641 (2006). "A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." State v. McCombs, 368 S.C. 489, 493, 629 S.E.2d 361, 362 - 63 (2006). However, the trial judge should deny a directed verdict motion and submit the case to the jury if there is any direct or substantial circumstantial evidence reasonably tending to prove the guilt of the accused or from which guilt may be

fairly or logically deduced. State v. Cherry, 361 S.C. 588, 606 S.E.2d 475 (2004) (emphasis added); State v. Williams, 266 S.C. 325, 223 S.E.2d 38 (1976). “[A] trial [court] is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis.” State v. Zeigler, 364 S.C. 94, 102 – 03, 610 S.E.2d 859, 863 (Ct. App. 2005). In State v. Cherry, 361 S.C. 588, 593-594, 606 S.E.2d 475, 478 (2004), the Court described circumstantial evidence and direct evidence as follows:

There are two types of evidence which are generally presented during a trial – direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.

Where the State relies exclusively on circumstantial evidence, the trial court must submit the case to the jury if there is any substantial circumstantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced. State v. Buckmon, 347 S.C. 316, 555 S.E.2d 402 (2001). A case is considered a direct evidence case, rather than circumstantial, when the State relies upon direct evidence to prove the acts of the crime and the identity of the perpetrator, and circumstantial evidence was merely corroborative or offered to demonstrate intent. State v. Salisbury, 343 S.C. 520, 541 S.E.2d 247 (2001) (stating the officers’ personal observations and opinions of the defendant’s actions, appearance, and condition constitute direct evidence of DUI because it is based on the officers’ actual knowledge of the situation and requires no inference from the jury).

On appeal from the denial of a directed verdict, an appellate court must view the evidence and all reasonable inferences in light most favorable to the State. State v.

Weston, 367 S.C. 279, 625 S.E.2d 641 (2006). If there is any direct or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury.” State v. Cherry, 361 S.C. at 588, 593 – 94, 606 S.E.2d 475, 478. “[U]nless there is a total failure of evidence tending to establish the charge laid in the indictment, the trial judge’s ruling upon a motion for a directed verdict must stand absent an error of law.” State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986).

Appellant was charged with armed robbery in violation of S.C. Code Ann. § 16-16-11-330 (A) (2003), which provides that “[a] person who commits robbery while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, is guilty of a felony.” S.C. Code Ann. § 16-11-330 (A). “Robbery is defined as the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear. The crime is ‘armed robbery’ when a person commits a robbery while armed with a deadly weapon.” State v. Thompson, 374 S.C. 257, 262, 647 S.E.2d 702, 705 (Ct. App. 2007), citing State v. Bland, 318 S.C. 315, 317, 457 S.E.2d 611, 612 (1995); see also State v. Nix, at 492, 343 S.E.2d at 627. “Under the ‘hand of one is the hand of all’ theory [of accomplice liability], one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and

purpose.” State v. Thompson, at 261, 647 S.E.2d at 704, citing Sate v. Condrey, 349 S.C. 184, 195, 562 S.E.2d 320, 324 (Ct. App. 2002).

The record before this Court reflects that Appellant moved for a directed verdict as to the armed robbery charge at the close of the State’s case arguing the State failed to present any testimony that money or property was taken because the restaurant manager Devin Johnson was not called as a witness at trial. (R. pp. 110 – 111). The discussion about Appellant’s motion verifies that the sole ground offered was the State’s failure to establish that money or property was taken. (R. p. 110-116). The trial court denied the motion, finding the evidence was sufficient to submit the charge to the jury and that Appellant was improperly asking it to consider the weight rather than existence of evidence. (R. pp. 111 - 117). The motion was renewed at the close of Appellant’s case and was again denied. (R. p. 149).

The only argument Appellant presented at trial to support his request for a directed verdict of acquittal as to the armed robbery charge was the lack of evidence to establish that money or property was taken during the armed robbery based upon the fact that restaurant manager Johnson did not testify at trial.¹ The State submits the evidence

¹ There is no question that a gun was present and used by Appellant and his companion to put the employees of Captain D’s in fear of their lives in order to gain entry into the closed restaurant and to secure compliance with their demands for the contents of the safe. Scott Hall and Jameshia Alston testified to seeing the gun, which looked and felt to be real. Hall testified that when it touched his skin, the gun was cold and had the feel and weight of a real gun. Hall testified that the gun was held to his head as he was forced inside the restaurant by the perpetrators and as the gunman demanded to be taken to the safe. Alston reported seeing the gun being held against Hall’s head, of the demands made by the perpetrators to accomplish the armed robbery, and compliance by Hall, Alston, and Devin Johnson with those demands in the face of the gun and forceful demands and actions of the perpetrators. Alston was also in fear for her life. It is also uncontested that, while using the gun, Appellant’s accomplice in the armed robbery demanded access to the restaurant safe and that restaurant manager Devin Johnson was

and the reasonable inferences arising from the evidence were sufficient to support the denial of the directed verdict motions. As set forth in Respondent's Statement of Facts herein, Alston testified that she was counting down her cashier's drawer to one-hundred and fifty dollars to thereafter place it the safe where the restaurant cash is stored. However, Alston was interrupted in this process by the arrival of the armed perpetrators and heard and observed Hall being held at gunpoint and Hall being forced to take the gunman to the location of the restaurant safe. Alston's response was "Oh my God, I'm going to die" and compliance with the demands of the perpetrators. (R. p. 11).

Scott Hall testified that he was forced into the restaurant at gunpoint and complied with the gunman's demand to be taken to the safe. Hall observed the gunman pick up a "take-out" bag as they walked toward the safe. Hall was in the presence of the gunman and Johnson but was forced down on his hands and knees by the gunman at the location of the safe. Hall heard the gunman demand money from restaurant manager Johnson and heard Johnson fumbling as he tried to open the safe. Johnson was the only person present in the restaurant with access to the safe. During the interaction between the gunman and Johnson, Hall heard the gunman direct Johnson to leave the coins and only give him the cash. "Give me the money, I don't want the damn coins." (R. pp. 39; 49). Hall testified that the gunman put the money in the "take-out" bag. Hall also testified that the gunman "had gotten the money and everything." After this exchange between the gunman and

heard as he fumbled in his efforts to comply with the gunman's demands. Appellant does not contested the evidence presented establishing that Alston knew Appellant from an earlier encounter at the restaurant and identified him in court as one of the perpetrators of the armed robbery. U.S. v. Koche, 416 F.2d 370 (4th Cir. 1969) (where four bank employees positively identified the defendant as one of two perpetrators). While Appellant was not the person with the gun, he clearly joined and acted in concert with and aided in the commission of the armed robbery. See State v. Thompson, at 257, 647 S.E.2d at 702.

Johnson, Hall was directed by the gunman to stand with his arms above his head. Hall further testified that money was missing from the safe that night and he had to count the money left in the drawers. Hall testified that he and Johnson were taken into the “cooler” while the gun was still being held against Hall’s head. Before leaving, the perpetrators searched Hall, Alston, and Johnson for “cell phones and anything else that they had.” (R. pp. 12 – 13). Johnson’s cell phone was taken. (R. p. 76).

Officer Royster testified that Johnson was questioned but was not a suspect in the armed robbery because Johnson explained suspicious telephone calls, left some money in the safe during the armed robbery, and had his cell phone stolen by the perpetrators. (R. p. 65; 76-77; 80-81; 91-92). Photographs also depict the scene, coins and safe. (R. p. 59; State’s exhibits 1 – 12).

Contrary to Appellant’s argument to the trial court, the evidence presented at Appellant’s trial and inferences arising from the evidence taken in the light most favorable to the State were sufficient to establish that money or property was taken to withstand the motion as to the armed robbery charge. State v. Childs, 299 S.C. 471, 385 S.E.2d 839 (1989) (stating testimony indicating \$87.00 was unaccounted for after the murder of the victim is sufficient to establish that money was taken from the person or in the presence of the victim). The State submits that the trial court properly determined that the weight of the evidence, credibility of the witnesses and conflicts in the evidence as advanced by Appellant are matters that must be left to the jury as the finder of fact. McDill v. Mark’s Auto Sales, Inc., 367 S.C. 486, 626 S.E.2d 52 (2006). Assessing the weight of the evidence is not a task undertaken by the trial judge when ruling on a motion for directed verdict. State v. Thompson, at 257, 647 S.E.2d at 702. Hall’s later answers

during cross-examination do not negate the existence of that evidence. Instead, any discrepancies in later answers are matters related to the weight of the evidence which is solely a matter for the jury. See State v. Kornahrens, 290 S.C. 281, 288, 350 S.E.2d 180, 185 (1986) (stating that while the evidence supporting the burglary charge is disputed, testimony of a witness was sufficient to submit the issue of burglary to the jury); State v. Stuckey, 347 S.C. 484, 556 S.E.2d 403 (Ct. App. 2001) (stating that while it is contradicted by other evidence, a witness' statement that the victim was crying during a car ride constitutes direct evidence that that the victim was alive and reasonably tends to prove the defendant participated in an on-going kidnapping such to withstand a directed verdict motion.). Appellant's apparent suggestion that it is reasonable to believe the perpetrators left the restaurant without taking any money is simply not supported by the evidence.

As to Appellant's reliance on the fact that the manager Devin Johnson did not testify despite being there on the night in question and having the close contact with the gunman, the State submits this fact is immaterial to the findings of guilt and issues raised on appeal. Evidence presented at trial concerning the actual robbery and Johnson's involvement was illustrated by the testimony of fellow employees, Hall and Alston, as well as that of Detective Royster. See State v. East, 353 S.C. 634, 638, 578 S.E.2d 748, 751 (Ct. App. 2003) (stating that the failure of the State to call a victim as a witness does not require a directed verdict when other "employees that [said victim] was present when they were confined in the hallway."); see also State v. Charping, 333 S.C. 124, 129, 508 S.E.2d 851, 854 (1998) (stating that "an adverse inference from the unexplained failure of a party to call an available witness is generally held not warranted where the material

facts assumed to be within the knowledge of the absent witness have been testified to by other qualified witnesses).

The State also submits that, to the extent Appellant is advancing any other ground in support of his argument that a directed verdict should have been granted, it is clear from the record that nothing else was presented by Appellant to the trial court for its consideration and is, therefore, not preserved for appellate review. Pursuant to the error preservation rules in South Carolina, this Court may not reverse a trial court for error in a ruling when the trial court was not presented with the argument at trial and never ruled on the specific ground offered as error on appeal. Creech v. South Carolina Wildlife and Marine Resources Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997); see also Connolly v. People's Life Ins. Co. of South Carolina, 299 S.C. 348, 384 S.E.2d 738 (1989). Our error preservation rules require objections or motions to be made on specific grounds by Appellant and subsequent responsive rulings by the trial court. A motion or objection without a specific ground or without a ruling fails to preserve an issue for appellate review. Busillo v. City of North Charleston, 404 S.C. 604, 745 S.E.2d 142 (Ct. App. 2013); State v. Jennings, 394 S.C. 473, 481-482, 716 S.E.2d 91, 95 (2011); State v. Rogers, 361 S.C. 178, 603 S.E.2d 910 (Ct. App. 2004); State v. Hudgins, 319 S.C. 233, 460 S.E.2d 388 (1995) overruled on other grounds by State v. Collins, 320 S.C. 23, 495 S.E.2d 202 (1998); State v. Morris, 307 S.C. 480, 415 S.E.2d 819 (Ct. App. 1991). An issue may not be raised for the first time on appeal, but must have been raised to the trial court to be preserved for appellate review. State v. Carlson, 363 S.C. 586, 611 S.E.2d 283 (Ct. App. 2005). Appellant's argument on appeal is without merit and the ruling of the trial court must be affirmed.

II.

The issue Appellant presents of trial court error in the denial of his motion for a directed verdict respecting the kidnapping charges cannot be considered on appeal when the ground advanced on appeal was not presented to or ruled upon by the trial court; nevertheless, the trial court properly denied Appellant's motion for directed verdict on both kidnapping charges based upon direct, eyewitness testimony of the victims.

Appellant argues to this Court on appeal that the trial court erred by refusing to grant directed verdict motions on the kidnapping charges related to Jameshia Alston and Scott Hall contending the kidnappings were incidental to the confinement during the armed robbery and the State's failure to present substantial circumstantial evidence that money forcibly taken from manager Devin Johnson entitled him to a directed verdict on kidnapping. He claims that acquittal on the armed robbery charge requires acquittal of kidnapping.

First, that State submits that this argument was not made to the trial court in support of Appellant's motions for directed verdict as to the kidnapping charges and, therefore, cannot be considered by this Court on appeal. The State also submits that Appellant's argument that the kidnapping charges merged into the armed robbery charge and could not stand if Appellant was acquitted of armed robbery is simply contrary to established precedent and is not logical. Moreover, for the reasons stated in Respondent's Argument I herein, the motion for directed verdict of acquittal as to armed robbery was properly denied. Additionally, the record before this Court reveals more than sufficient evidence to support the trial court's decision to submit the kidnapping charges to the jury.

At the close of the State's case, Appellant moved for directed verdicts of acquittal respecting the two kidnapping charges in question arguing solely that "[t]he State has presented no credible evidence upon which a jury would be able to base a decision of guilt." (R. p. 110). Appellant offered nothing further to support his request even when specifically asked by the trial court. (R. p. 116 - 117). The directed verdict motion on the kidnapping charges was later renewed without a stated ground. The motions were denied. (R. pp. 116-117; 149). On appeal, Appellant urges this Court to reverse the trial court's ruling arguing the trial court erred in denying his motions. However, the error advanced by Appellant on appeal is based on a ground Appellant failed to present to the trial court for consideration and upon which he failed to secure a ruling. Pursuant to the error preservation rules in South Carolina, this Court may not reverse a trial court for error in a ruling when the trial court was not presented with the argument at trial and never ruled on the specific ground offered as error. Creech v. South Carolina Wildlife and Marine Resources Dep't, 328 S.C. at 24, 491 S.E.2d at 571; see also Connolly v. People's Life Ins. Co. of South Carolina, 299 S.C. at 348, 384 S.E.2d at 738. Error preservation rules require an objection or motion to be made on specific grounds by Appellant and a subsequent responsive ruling by the trial court. A motion or objection without a specific ground or without a ruling fails to preserve an issue for appellate review. Busillo v. City of North Charleston, 404 S.C. at 604, 745 S.E.2d at 142; State v. Jennings, 394 S.C. at 481-482, 716 S.E.2d at 95; State v. Rogers, 361 S.C. at 178, 603 S.E.2d at 910; State v. Hudgins, 319 S.C. at 233, 460 S.E.2d at 388 overruled on other grounds by State v. Collins, 320 S.C. 23, 495 S.E.2d 202 1998); State v. Morris, 307 S.C. at 480, 415 S.E.2d at 819. An issue may not be raised for the first time on appeal, but

must have been raised to the trial court to be preserved for appellate review. State v. Carlson, 363 S.C. at 586, 611 S.E.2d at 283. “In order to preserve for review, an alleged error[,] an objection should be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonably understood by the [circuit court].” State v. Prioleau, 345 S.C. 404, 548 S.E.2d 213 (2001); see also State v. Dunbar, 356 S.C. 138, 587 S.E. 2d 691 (2003) (stating that in order to properly preserve an issue for review on appeal, the defendant must present the argument to the trial court and receive a ruling); State v. Kennerly, 331 S.C. 442, 503 S.E.2d 214 (Ct.App. 1998) (stating that arguments not presented to the trial court in support of directed verdict are not preserved for review on appeal).

The record simply fails to establish that the issue and ground Appellant now raises on appeal were presented first to the trial court to enable the trial court to consider Appellant’s position and make a ruling responsive to Appellant’s requests. See I’On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724-25 (2000) (“The losing party must first try to convince the lower court it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must both present his issues before an appellate court will review those arguments.”). Accordingly, this Court should not consider the merits of Appellant’s argument respecting the trial court’s erroneous ruling when the trial court was never given an opportunity to consider the matter.

Nevertheless and assuming *arguendo* the issue is properly presented, the State submits that the trial court properly denied the motion in response to the ground advanced

by Appellant at trial. Pursuant to South Carolina Code Ann. § 16-3-910 (2003), kidnapping occurs when one “unlawfully seize[s], confine[s], inveigle[s], decoy[s], kidnap[s], abduct[s] or carr[ies] away any other person by any means whatsoever without authority of law” “South Carolina’s kidnapping statute requires proof of an unlawful act taking one of several alternative forms” and merely requires that at least one of these acts to accomplish kidnapping is satisfied. State v. East, 353 S.C. 634, 636 - 637, 578 S.E.2d 748, 749-750 (Ct. App. 2003). Kidnapping is a continuing offense which commences when a person is wrongfully deprived of freedom and continues until freedom is restored. State v. Stuckey, 347 S.C. 484, 556 S.E.2d 403 (Ct. App. 2001); see also State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180 (1986).

In this case, the Captain D’s employee Jameshia Alston testified that she saw Scott Hall with a gun held to his head and being directed inside by the perpetrators. She also saw that Hall was being forced to take the gunman to the location of the safe. Alston said that Appellant stood at the back of the restaurant with her. Alston asked Appellant if she could go home. In response, Appellant demanded that Alston stay where she was. Alston was fearful, thought she was going to die, and complied with Appellant’s demands. Alston testified that Appellant held her at the back of the restaurant and then walked her to an area outside the “cooler” where he made her stand. Alston testified that Appellant thereafter forced Alston inside the “cooler” where she was held until Appellant and the gunman left.

Scott Hall also presented testimony establishing that he was forced into the restaurant at gunpoint by Appellant and the gunman and that he was forced to take the gunman to the safe at the front of the restaurant. Hall was also directed by the gunman to

get onto his hands and knees on the floor. Hall was fearful for his life and did as the gunman demanded. Later, the gunman forced Hall to stand with his arms over his head and to walk to the "cooler." Hall was then ordered inside the "cooler" with Alston where they remained until Appellant and the gunman left.

It is clear that Hall and Alston were held at gunpoint, were directed where to stand, kneel and walk, were placed in fear for their lives and were unlawfully deprived of their freedom by the concerted action of Appellant and his accomplice. It is abundantly clear that neither was free to leave or move as they desired. This evidence was sufficient to establish kidnapping. State v. Tucker, 334 S.C. 1, 13, 512 S.E.2d 99, 105 (1999) (stating that kidnapping is an offense which "commences when one is wrongfully deprived of freedom and continues until freedom is restored."). The motion made to the trial court was properly denied. State v. Cherry, 361 S.C. at 588, 606 S.E.2d at 475.

As to Appellant's unpreserved argument that the kidnapping offense merged into the armed robbery offense, the State submits that this argument has been considered and rejected. Our supreme court and this Court have held that a defendant cannot escape a kidnapping conviction by claiming that the kidnapping was incidental to the offense of armed robbery or another offense in which confinement is an integral matter. See State v. Hall, 280 S.C. 74, 310 S.E.2d 429 (1983) (holding that the restraint of the victim constituted kidnapping despite the fact that the taking was to facilitate the commission of sexual battery); State v. Owens, 309 S.C. 402, 424 S.E.2d 473 (1992) (stating prosecution for murder after a kidnapping conviction for the murder victim is not barred by double jeopardy even though a majority of the evidence linking the defendant to the murder could have been discovered at the time of the kidnapping trial); State v. Tucker, 334 S.C.

1, 512 S.E.2d 99 (1998) (stating that restraint constitutes kidnapping regardless of the fact that the purpose of the seizure was to facilitate the commission of burglary and robbery); State v. East, 353 S.C. 634, 578 S.E.2d 748 (Ct. App. 2003)(same). In State v. Porter, this Court acknowledged that “[l]ogically, in order to commit armed robbery, an assailant must constrain his victim’s activities in some way; otherwise the victim could simply walk away,” but determined that confining bank employees and customers while robbery was taking place could support a finding of kidnapping regardless of whether it was incidental to an armed robbery. State v. Porter, 389 S.C. 27, 39, 698 S.E.2d 237, 243 (Ct. App. 2010). This Court’s conclusion was based on a determination by our supreme court that “when a single act combines the requisite ingredients of two distinct offenses, the defendant may be severally indicted and punished for each.” State v. Steadman, 216 S.C. 579, 589, 59 S.E.2d 168, 171 (1950). Moreover, this Court noted in Porter that similar to Alston and Hall, people in the bank were being confined against their will but were not being robbed which also supported kidnapping independent of armed robbery. Porter, 389 S.C. 27, 40, 698 S.E.2d 327, 244.

In rejecting Appellant’s argument, this Court should consider that it and our supreme court have concluded the charge of armed robbery has no bearing on the viability of the kidnapping charges. Further, relevant to this case is the fact that Alston and Hall themselves were not being robbed; rather, Captain D’s restaurant was the victim. Pursuant to Porter, this fact further supports an independent finding of kidnapping. Additionally, this Court should also consider that the trial court charged the jury that each indictment is a separate and distinct offense and must be decided separately. (R. p. 180). State v. East, 353 S.C. at 634, 578 S.E.2d 748.

The ruling of the trial court must be affirmed.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

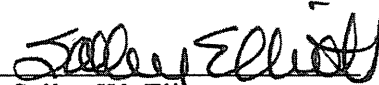
Respectfully submitted,

ALAN WILSON
Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

J. STROM THURMOND
Solicitor, Second Judicial Circuit

BY:



Salley W. Elliott
S.C. Bar No. 1871

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
August 26, 2015

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2014-000852

THE STATE,.....RESPONDENT

v.

JOHN LYNDON UPSON,.....APPELLANT.

CERTIFICATE OF COUNSEL

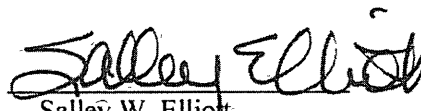
The undersigned hereby certifies the Final Brief of Respondent complies with Rule
211(b), SCACR.

ALAN WILSON
Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

J. STROM THURMOND
Solicitor, Second Judicial Circuit

BY:


Salley W. Elliott
S.C. Bar No. 1871

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
August 26, 2015

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2014-000852

THE STATE, ...RESPONDENT

v.

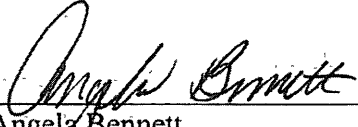
JOHN LYNDON UPSON, ...APPELLANT.

PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Final Brief of Respondent* dated August 26, 2015, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

John H. Strom, Appellate Defender
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

I further certified that all parties required by Rule to be served have been served.
This 26th, day of August, 2015.



Angela Bennett
Administrative Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

APP'X 339

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHN LYNDON UPSON,

APPELLANT

APPELLATE CASE NO. 2014-000852

FINAL REPLY BRIEF OF APPELLANT

JOHN H. STROM
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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ARGUMENT IN REPLY

I.

The trial court erred in denying Petitioner's directed verdict motion where the evidence presented at Appellant's trial and inferences arising therefrom were not sufficient to establish that money or property belonging to Captain D's Seafood was forcibly taken from the person or in the presence of Devin Johnson.

The State argues that Scott Hall's testimony provided substantial circumstantial evidence that money was forcibly taken in Devin Johnson's presence. Respondent's Brief at p. 10. Specifically, the State noted that Hall claimed the gunman left after he, "had gotten the money and everything." *Id.* Understandably, the State dismisses Hall's later clarification on cross-examination that: he could not see the safe, he could not see Johnson interact with the gunman, he could not see the registers, and he did not know if any money was taken. R. 52, ll. 17 – R. 53, ll. 4; R. 56, ll. 25 – R. 57, ll. 14.

Likewise Hall also explained that, while he counted the registers after the incident, he had no idea if any money had been taken because he did not know how much money was in the registers before the alleged robbery. *Id.* When looking at Hall's testimony as a cohesive whole, the only reasonable inference is that his reference to the gunman having "gotten the money and everything," was simply an assumption unsupported by his observations at the time of the incident. Hall unequivocally stated on cross and re-cross examination that he did not, in fact, witness any money being taken from the store safe. R. 52, ll. 17 – R. 53, ll. 4; R. 56, ll. 25 – R. 57, ll. 14; *see Roper v. Dynamique Concepts, Inc.*, 316 S.C. 131, 447 S.E.2d 218 (Ct. App. 1994)(no jury issue is created where the evidence, as a whole, is susceptible of only one reasonable inference).

The State further contends that Jameshia Alston's recalling that she did not complete her drawer count was relevant to proving that money was forcibly taken from the person or in the

presence of Devin Johnson. Respondent's Brief at p. 10. In actuality, her testimony had no bearing on the asportation element of robbery. Alston testified that she was counting down her draw in the restaurant's back office and that she was immediately led into the freezer. R. 17, ll. 1-14. She never finished counting her drawer and there is no evidence that her drawer was ever taken to the restaurant's safe located in the front of the service area. *Id.*

Alston never testified that any money was missing from her drawer – presumably still located in the back office – and she could not have seen Johnson's interactions with the gunman at the store safe. The State's comparison to *State v. Childs* is inapt. 299 S.C. 471, 385 S.E.2d 839 (1989); Respondent's Brief at p. 11. In *Childs*, the convenience store manager conducted a post-robbery accounting and determined that about one hundred dollars was missing. *Id.* at 478, 385 S.E.2d at 479. In the present case, neither Hall nor Alston conducted such a count, whether Johnson made a post-incident count, in his capacity as restaurant manager, is unknown because the State did not call him at trial.

Finally, the State contends that Devin Johnson's absence at trial is "immaterial". Respondent's Brief at p. 12. On the contrary, Johnson's failure to testify is material to whether the State presented substantial circumstantial evidence that Appellant did "feloniously take from the person or presence of Devin Johnson by means of force or intimidation goods or monies of Captain D's...." R. 190.

For this reason, the State's reliance on *State v. East*, is misplaced. 353 S.C. 634, 638, 578 S.E.2d 748, 751 (Ct. App. 2003). In *East*, this Court affirmed the denial of a directed verdict motion on a kidnapping charge because there was testimony from other employees that the non-testifying employee was confined against his will in the hallway with them. *Id.* In the present case, there is no equivalent testimony. Hall stated that he did not see any money belonging to Captain D's being

forcibly taken from Johnson; neither did Alston. R. 52, ll. 17 – R. 53, ll. 4; R. 56, ll. 25 – R. 57, ll. 14.

Moreover, given the ambiguity of his involvement and the unexplained withdrawal of the indictment for his kidnapping, Johnson's participation in the incident was not adequately "illustrated" by his co-workers' testimony. Respondent's Brief at p. 12. Therefore, it cannot be assumed from Hall's, Alston's, or even Detective Royster's testimony that money was forcibly taken from Devin Johnson.

Accordingly, the evidence relied upon by the State does not amount to substantial circumstantial evidence reasonably tending to prove Appellant's guilt, or from which his guilt may be fairly and logically deduced and the trial court erred in refusing to grant a directed verdict on Appellant's indictment for armed robbery. *State v. Bostick*, 392 S.C. 134, 708 S.E.2d 774 (2011).

II.

Whether the trial court erred by refusing to grant a directed verdict on Appellant's indictments for the alleged, incidental kidnappings of Scott Hall and Jameshia Alston is preserved for appellate review.

Alston and Hall were restrained in the course of performing their duties as Captain D's employees. Any force used to restrain them was incidental to the force used to attempt the alleged armed robbery. The majority view in other jurisdictions is that kidnapping statutes do not apply to unlawful confinements or movements *incidental to the commission of other felonies*. *State v. White*, 362 S.W.2d 559 (Tn. 2012); *see also Hurd v. State*, 22 P.3d 12 (Alas.App.2001); *People v. Powell*, 716 P.2d 1096 (Co. 1986); *Tyre v. State*, 412 A.2d 326 (Del.1980); *Delgado v. State*, 71 So.3d 54 (Fla.2011); *State v. Robinson*, 859 N.W.2d 464 (Ia. 2015) ; *State v. Cabral*, 619 P.2d 1163 (Kan. 1980); *State v. Estes*, 418 A.2d 1108 (Me.1980); *People v. Wesley*, 365 N.W.2d 692 (Mich. 1984); *Cuevas v. State*, 338 So.2d 1236 (Miss.1976); *Wright v. State*, 581 P.2d 442 (Nv.1978); *State v. Masino*, 466 A.2d 955 (N.J. 1983); *State v. Fulcher*, 243 S.E.2d 338 (N.C. 1978); *State v. Parker*, 768 S.E.2d 1 (NC Ct. App. 2014); *State v. Logan*, 397 N.E.2d 1345 (Oh. 1979); *State v. Garcia*, 605 P.2d 671 (Or. 1980); *State v. Innis*, 433 A.2d 646 (R.I. 1980); *State v. Curtis*, 298 N.W.2d 807 (S.D.1980); *State v. Green*, 616 P.2d 628 (Wa. 1980); *State v. Miller*, 336 S.E.2d 910 (W.Va.1985); *see also Model Penal Code § 212.1* (1980) (requiring movement over a substantial distance or confinement for a substantial period of time).

Further, the directed verdict motion on both kidnapping charges was sufficiently presented so as to be preserved for appellate review. Error preservation principles are intended to enable the trial court to rule after it has considered all relevant facts, law, and arguments. *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 103, 594 S.E.2d 485, 498 (Ct.App.2004) With respect to criminal cases, appellate

courts should reach the merits when error preservation is doubtful. *See Atl. Coast Builders & Contractors v. Lewis*, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012).

At the close of the State's case, defense counsel, "moved for a directed verdict with regards to the kidnapping charges, both kidnapping charges, as well as the armed robbery." R. 110, ll. 13-17. The parties argued at length about Alston's and Hall's testimony regarding the events of the incident, including, whether Alston was able to put the money from her cash register drawer in the safe before the two masked men forced her into the restaurant's cooler. R. 110, ll. 18 – R. 117, ll. 18.

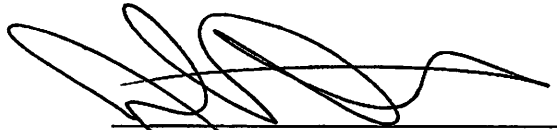
Before ruling, the trial court stated to defense counsel, "[n]ow anything specifically as it relates to the kidnapping charge? *I know you've made a motion for directed verdict. And certainly you're protected on the record on that.* Is there anything else specifically on that?" R. 116, ll. 13-22 (*emphasis added*). After again noting that Johnson was not called by the state and no post-incident accounting was conducted, the defense concluded its argument. R. 117, ll. 1-19. After the defense rested, counsel renewed his directed verdict motion with respect to both kidnapping charges and the armed robbery charge. R. 149, ll. 9-17.

In the present case, the trial court clearly stated that he considered the directed verdict motions on kidnapping charges and the armed robbery charge to have been sufficiently presented. R. 116, ll. 13-22. The court's decision was logical given that the alleged kidnappings were incidental to the alleged armed robbery. The court –exercising its discretion – felt that defense counsel's arguments were sufficiently presented to enable it to rule on all three indictments. Accordingly, this issue is preserved for appellate review. *State v. Langford*, 400 S.C. 421, 735 S.E.2d 471 (2012) *citing Williams v. Bordon's Inc.*, 274 S.C. 275, 262 S.E.2d 881 (1980) (trial judge has broad discretion and inherent power to control the conduct of a trial).

CONCLUSION

For the reasons previously stated in Appellant's brief and for these additional reasons, Appellant John Upson respectfully requests that this Court issue an Order of Acquittal on his convictions.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'John H. Strom', is written over a horizontal line.

John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT.

This 11th day of August, 2015.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

August 11, 2015



John Harrison Strom
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1330

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

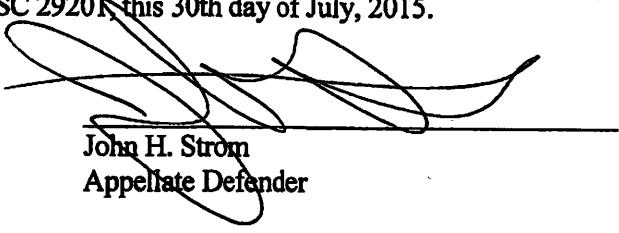
JOHN LYNDON UPSON,

APPELLANT

APPELLATE CASE NO. 2014-000852

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 30th day of July, 2015.


John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 11th day of August, 2015.


_____(L.S.)
Notary Public for South Carolina

My Commission Expires: May 12, 2025.

APP'X 351

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

John Lyndon Upson, Appellant.

Appellate Case No. 2014-000852

Appeal From Aiken County
Donald B. Hocker, Circuit Court Judge

Unpublished Opinion No. 2016-UP-237
Submitted January 1, 2016 – Filed June 1, 2016

AFFIRMED

Appellate Defender John Harrison Strom, of Columbia,
for Appellant.

Attorney General Alan McCrory Wilson, and Senior
Assistant Deputy John Benjamin Aplin, both of
Columbia; and Solicitor James Strom Thurmond, Jr., of
Aiken, for Respondent.

PER CURIAM: John Lyndon Upson appeals his convictions for one count of armed robbery and two counts of kidnapping. We affirm¹ pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether the trial court erred in denying Upson's motion for a directed verdict on the armed robbery charge: *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006) ("When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight."); *State v. Gilliland*, 402 S.C. 389, 397, 741 S.E.2d 521, 525 (Ct. App. 2012) ("An appellate court reviews the denial of a directed verdict by viewing the evidence and all reasonable inferences to be drawn therefrom in the light most favorable to the State."); *State v. Cherry*, 361 S.C. 588, 593-94, 606 S.E.2d 475, 477 (2004) ("If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury."); *State v. Drayton*, 293 S.C. 417, 428, 361 S.E.2d 329, 335 (1987) ("Robbery is defined as the felonious or unlawful taking of money, goods or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear."); S.C. Code Ann. § 16-11-330(A) (2015) (stating armed robbery occurs when a person commits robbery while armed with a deadly weapon); *State v. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct. App. 2002) ("Under the 'hand of one is the hand of all' theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose."); *State v. Hale*, 284 S.C. 348, 356, 326 S.E.2d 418, 423 (Ct. App. 1985) ("It is the function of the jury, not an appellate court, to judge the credibility of witnesses and the weight to be given to their testimony."); *State v. Charping*, 333 S.C. 124, 129, 508 S.E.2d 851, 854 (1998) ("[A]n adverse inference from the unexplained failure of a party to call an available witness is generally held not warranted where the material facts assumed to be within the knowledge of the absent witness have been testified to by other qualified witnesses.").

2. As to whether the trial court properly denied Upson's motions for a directed verdict on the kidnapping charges: *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal."); *id.* at 142, 587 S.E.2d at 694 ("A party may not argue one ground at trial and an alternate ground

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

on appeal."); *State v. Kennerly*, 331 S.C. 442, 455, 503 S.E.2d 214, 221 (Ct. App. 1998) ("In reviewing a denial of directed verdict, issues not raised to the trial court in support of the directed verdict motion are not preserved for appellate review.").

AFFIRMED.

HUFF, A.C.J., and WILLIAMS and THOMAS, JJ., concur.



RECEIVED
JUN 20 2016

ATTORNEY GENERALS
OFFICE
The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

June 17, 2016

The Honorable Liz Godard
PO Box 583
Aiken SC 29802-0583

REMITTITUR

Re: The State v. John L. Upson
Lower Court Case No. 2014GS0200074, 2014GS0200079, 2014GS0200080
Appellate Case No. 2014-000852

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

The following exhibits filed in this case are being returned to you:

State's Exhibit #1-14 - Photographs

Please sign and return the enclosed copy of this letter acknowledging receipt of these items.

Exhibit Receipt Acknowledgment

Name: _____ Date: _____

APP'X 355

Very truly yours,

V. Claude Allen, Deputy

CLERK

Enclosure

cc: Alan McCrory Wilson, Esquire
John Harrison Strom, Esquire
James Strom Thurmond, Jr., Esquire
John Benjamin Aplin, Esquire

FORM 5 2013A0220101013
2014GS0200079
2014GS0200080
IN THE COURT OF COMMON PLEAS

STATE OF SOUTH CAROLINA

County of Aiken

Full name and prison number (if any) of Applicant

John Lyndon Upson v.
#229134

State of South Carolina

2017CP0200129

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention McCormick Correctional Institution
396 Redemption Way, McCormick SC 29899
2. Name and location of Court which imposed sentence Aiken County
Court House Aiken SC
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) 2014-GS-02-0074
(b) 2014-GS-02-0079

FILED 1-24-17
Robert L. White
Clerk of Court
Anita Kinney 1230
Deputy Clerk

- (c) 2014-GS-08-0080
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) April 16, 2014 20 years ran concurrent
- (b) April 16, 2014, 20 years ran concurrent
- (c) April 16 2014, 20 years ran concurrent
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty @ trial
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court Of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Affirmed
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. June 1, 2016
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective assistance of trial counsel
- (b) Ineffective assistance of trial counsel
- (c) Ineffective assistance of trial counsel
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Failure to fully cross-examine Jamechia Alston
- (b) Failure to ask for Neils-v-Biggers hearing
- (c) Continue on attached page.
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? No
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
- (d) any other petitions, motions or applications in this or any other Court? No
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. _____
- ii. _____
- iii. _____
- iv. _____

- (D) Failure to subpoena alibi witnesses Ivory Corley, Nicole Bright, and Brenda Smith
- (E) Failure to fully put the State's case to the test/or fully refute the State's theory of the case with available evidence and witnesses, which resulted in prejudice to applicant.
- (F) Failure to object to applicant being charged and standing trial for armed robbery. When 14th and 6th amendment were violated by the confrontation clause
- (G) Failure to object to in-court identification
- (H) Failure to object to bolstering by the State during closing arguments

(c) the disposition thereof:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. _____
- ii. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. _____
- ii. _____
- iii. _____

Revised 3/2003

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) _____
- (b) _____
- (c) _____

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? _____
- (b) your trial, if any? yes
- (c) your sentencing? yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?

No

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:
 - i. Andrew Smith, Aiken County Public Defenders
Office
 - ii. John H. Strom, SC Commission on Indigent
Defense, Division of Appellate Defense, P.O. Box
11589 Columbia SC 29211-1589
 - iii. _____
- (b) the proceedings at which each such attorney represented you:
 - i. (Andrew Smith) attorney @ trial and sentencing
 - ii. (John H. Strom) attorney @ appeal
 - iii. _____

19. State clearly the relief you seek in filing this application:

20. Are you now under sentence from any other court that you have not challenged?

No

STATE OF SOUTH CAROLINA)

County of Aiken)

VERIFICATION

I, John Lyndon Upson, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application, and that the matters and allegations therein set forth are true.

John Lyndon Upson

SWORN to and subscribed before me this 23rd
day of January 2017.
Michael Caruana
(L.S.)
Notary Public

My Commission Expires: July 09, 2026

Revised 3/2003

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, John Lyndon Upson, hereby apply for leave to
proceed in this action without prepayment of fees or costs or security therefor. In support of my
application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give
security thereof.

John Lyndon Upson
Applicant

SWORN, affirmed to and subscribed before me this

23rd day of January, 2017.
Michael Canane
Notary Public

My Commission Expires: July 09, 2026

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

SECOND JUDICIAL CIRCUIT

COUNTY OF AIKEN)

CASE NO.: 2017-CP-02-0129

John Upson, #229134)

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff,)

vs.)

State of South Carolina)

Defendant.)

Plaintiff's Attorney:
Arthur K. Aiken, Bar No. _____
Address:
2231 Devine St., Ste 203 Columbia SC 29205
Phone: _____ Fax _____
E-mail: _____ Other: _____

Defendant's Attorney:
Julie A. Coleman, Bar No. 102214
Address:
PO Box 11549 Columbia, SC 29211-1549
Phone: 803-734-3737 Fax 803-734-4113
E-mail: _____ Other: _____

- ☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☒ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

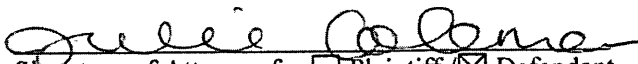
Nature of Motion: _____

Estimated Time Needed: _____ Court Reporter Needed: ☐ YES/☐ NO

SECTION II: Motion/Order Type

- ☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.


Signature of Attorney for ☐ Plaintiff/☒ Defendant

May 16, 2017
Date submitted

SECTION III: Motion Fee

- ☐ PAID - AMOUNT: \$ _____
☒ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☒ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other: _____

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached order.
☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

- ☐ MOTION FEE COLLECTED: \$ _____
☐ CONTESTED - AMOUNT DUE: \$ _____

APP'X 365

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

John Lyndon Upson, #229134,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

2017-CP-02-0129

RETURN

Respondent, making its Return to the Application for Post-Conviction Relief ("PCR") filed on January 24, 2017, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. In January 2014, the Aiken County Grand Jury indicted Applicant for armed robbery (2017-GS-02-0074) and two counts of kidnapping (2014-GS-02-0079, -0080). Andrew Smith, Esquire represented Applicant. Solicitor James Strom Thurmond, Jr., Esquire prosecuted the case. On April 15-16, 2014, Applicant proceeded to trial before the Honorable Donald B. Hocker. The jury found Applicant guilty as indicted. Judge Hocker sentenced Applicant to imprisonment for concurrent terms of twenty years each for armed robbery and kidnapping.

Applicant filed a timely notice of appeal. John H. Strom, Esquire, of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on June 1, 2016. State v. Upson, Op. No. 2016-UP-237 (S.C. Ct. App. filed June 1, 2016). The remittitur was returned to the circuit court on June 17, 2016.

Attached to this Return and incorporated by reference are the records of the Aiken County

Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the trial transcript, Applicant's appellate records, and the application. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his application for post-conviction relief, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective assistance of trial counsel"
 - a. "Failure to fully cross-examine Jameshia Alston."
 - b. "Failure to ask for Neils v. Biggers hearing."
 - c. "Failure to subpoena alibi witnesses Ivory Corley, Nicole Bright, and Brenda Smith."
 - d. "Failure to fully put the State's case to the test/or fully refute the State's theory of the case with available evidence and witnesses, which resulted in prejudice to Applicant."
 - e. "Failure to object to Applicant being charged and standing trial for armed robbery when the 14th and 6th Amendments were violated by the confrontation clause."
 - f. "Failure to object to in-court identification."
 - g. "Failure to object to bolstering by the State during closing arguments."

III.

Respondent submits Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668. First, Applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 (1985).

Respondent submits Applicant can satisfy neither requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

V.

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRPC. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRPC. Pro se filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRPC.

VI.

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this Return is hereby denied.

VII.

WHEREFORE, Respondent requests that an evidentiary hearing be held on the claims of ineffective assistance of trial counsel.

[signature page to follow]

Respectfully submitted,

ALAN WILSON
Attorney General

ROBERT BOLCHOZ
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JULIE A. COLEMAN
Assistant Attorney General

By: Julie Coleman
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

May 16, 2017

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

JOHN L. UPSON, #229134

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

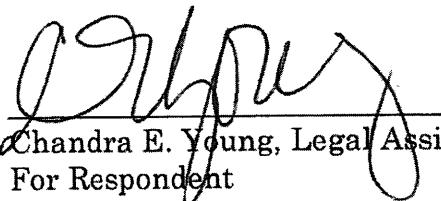
2017-CP-02-0129

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

Arthur K. Aiken, Esquire
2231 Devine St., Ste 203
Columbia, SC 29205

DATED this 16TH day of May, 2017.


Chandra E. Young, Legal Assistant
For Respondent

APP'X 371

State of South Carolina) In the Court of Common Pleas
County of Aiken) First Judicial Circuit
2017-CP-02-00129

John Lyndon Upson,)
Plaintiff,)
vs.)
The State of South Carolina,)
Defendant.)

May 5, 2018

Aiken, South Carolina

B e f o r e:

The Honorable R. Scott Sprouse, Judge

A p p e a r a n c e s:

Tommy A. Thomas, Esquire,
Attorney for the Plaintiff

Julie Coleman,
Attorney for the Defendant

Bonnie H. Kelly, CVR
Circuit Court Reporter

I N D E X

<u>WITNESS/DESCRIPTION</u>	<u>PAGE NO.</u>
Case Called/Ms. Coleman	4
Motion/Ms. Coleman	5
Response/Mr. Thomas	6
Decision by the Court	6
DIRECT CROSS REDIRECT RECROSS THOMAS SOLVENSKI	
Mr. Thomas	9 38
Ms. Coleman	30
JOHN UPSON	
Mr. Thomas	42
GRANT GIBBONS	
Ms. Coleman	67
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Closing Argument/Ms. Coleman	85
Closing Argument/Mr. Thomas	89
Decision by the Court	95
Certificate Page	96

E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>I.D.</u>	<u>EV.</u>
A-1	Map		21
A-1 (a)	Map		21
A-1 (b)	Map		21
A-2	Map		24
A-2 (a)	Map		24
A-3	Map		27
A-3 (a)	Map		27

1 (On the record at 11:27 a.m.)

2 MS. COLEMAN: May it please the Court?

3 THE COURT: Yes, ma'am.

4 MS. COLEMAN: This is *John Lyndon Upson v the State of*
5 *South Carolina*, docket No. 2017-CP-02-129. Applicant is
6 presently confined in the South Carolina Department of
7 Corrections pursuant to orders of commitment of the Aiken
8 County Clerk of Court.

9 In January, 2014, the Aiken County Grand Jury indicted
10 Applicant for armed robbery and two counts of kidnaping.
11 Andrew Smith, Esquire, represented the Applicant. Jay
12 Slocum and Kevin Maloney, Esquire, prosecuted the case.

13 On April 15 through the 16, 2014, Applicant proceeded
14 to a jury trial before the Honorable Donald B. Hocker. The
15 jury found Applicant guilty as indicted. Judge Hocker
16 sentenced Applicant to imprisonment for concurrent terms of
17 20 years each for armed robbery and kidnaping.

18 Applicant filed a timely notice of appeal. John H.
19 Strom, Esquire, of the Office of Appellate Courts,
20 perfected the appeal. The South -- the South Carolina
21 Court of Appeals affirmed Applicant's conviction on June 1,
22 2016. The remittitur was issued on June 17, 2016.

23 Applicant filed a timely application for post
24 conviction relief on January 24, 2017, alleging that he was
25 being held in custody unlawfully based on several

1 allegations of ineffective assistance of counsel. The
2 State filed its return on May 16, 2017, and the Applicant
3 is present today and is represented by Mr. Tommy Thomas.

4 And if I may, I've got a couple of issues I'd like to
5 put on the record. The State has a witness today, Mr. Andy
6 Smith, who represented the Applicant in this trial. He is
7 not available to testify today. He has moved to Colorado
8 and is employed there and will not be returning to South
9 Carolina. So we can't get him here to testify today.

10 Mr. Smith is on standby and is ready to testify by
11 telephone if Your Honor will allow it, but I believe the
12 Applicant objects to that -- to his telephone testimony.

13 So if Your Honor should not allow his testimony, we
14 would just ask to -- for the opportunity to leave the
15 record open at the conclusion of the hearing if some issue
16 comes up that should require his testimony on an issue, and
17 we can conduct a telephone deposition or obtain an
18 affidavit or some other way to get his testimony in.

19 I've also contacted Public Defender Grant Gibbons who
20 sat second chair on this trial. He is on his way over. He
21 was not at the courthouse today, but he said he could be
22 here in about an hour. So if some issue comes up, he might
23 be able to testify in response to it as well. He -- he
24 said he had a vague recollection of the case and -- and
25 might be able to answer some questions if that becomes

1 necessary at the end of the hearing. Thank you.

2 THE COURT: Mr. Thomas?

3 MR. THOMAS: Your Honor, if -- if it please the Court.
4 We would object. I've had some -- I have had some of the
5 -- the telephone testimony before. It went smoothly until
6 the last one, and we've had problems with being able to
7 show them documents and those types of things. So we would
8 object to that. I have no problem with the record being
9 held open should that become necessary, Your Honor.

10 THE COURT: What -- and -- and I will note, we -- we
11 had a conference with the attorneys ---

12 MR. THOMAS: Yeah.

13 THE COURT: --- prior -- prior to the hearing, and
14 that's what we'll do. We'll leave the record open and that
15 will allow each side to make the necessary arrangements.
16 And Mr. Thomas, you just let the Court know when ---

17 MR. THOMAS: Yes, sir.

18 THE COURT: --- you're able to. What I -- what I'll
19 do is hold it -- hold it open for 30 days, and -- and that
20 -- Mr. Thomas, will that give you enough time to make the
21 ---

22 MR. THOMAS: Yes, sir.

23 THE COURT: --- the arrangements?

24 MR. THOMAS: Yes. That'd be perfect.

25 THE COURT: Okay. So we -- we'll just hold the record

1 open for 30 days and ---

2 MS. COLEMAN: Thank you, Your Honor.

3 THE COURT: --- and you can inform the Court of your
4 progress at that time.

5 MR. THOMAS: Your Honor, if it'd please the Court as
6 well, just for a housekeeping measure, I have a tendency,
7 when I've asked testimony or asking questions, I'll also
8 cite to pages and lines in the transcript. I found that's
9 easier than have my client or have someone read that, and
10 so I wanted just to do that for the Court's information to
11 maybe try to help.

12 THE COURT: Thank you, Mr. Thomas.

13 MR. THOMAS: Your Honor, if I may beg the Court's
14 indulgence just for a second.

15 (Brief pause.)

16 MR. THOMAS: Your Honor, also my client had asked --
17 he's been very active in -- in helping me with this case.

18 THE COURT: Uh-huh.

19 MR. THOMAS: He'd like to ask if it's -- if he could
20 have one arm free or one hand free? I don't know what the
21 policy is in the courtroom. It would make it easier for
22 him to be able to -- he's got his information to sort
23 through and -- and also to make any notes.

24 THE COURT: Let me ask our -- would that be a -- would
25 that be a logistical problem?

1 CLERK OF COURT: What was the ...

2 THE COURT: He wants one arm free. Would that be a
3 logistical ---

4 THE BAILIFF: He's -- actually, he's -- we would
5 prefer not, but he's in the custody of the Department of
6 Corrections.

7 THE COURT: All right. Let me ask the Department of
8 Corrections.

9 (The Court confers with Department of Corrections
10 officer briefly.)

11 THE COURT: Okay. I -- let's -- we're going to --
12 we're going to let him stay like he is.

13 MS. THOMAS: Thank you, Your Honor. Your Honor, if it
14 please the Court, we're going to take one witness who is
15 here. He is a cell phone expert, Mr. Thomas Slovenski. I
16 want to take him kinda out of turn so we can get his
17 testimony, and then he may be able to -- to leave earlier,
18 Your Honor.

19 THE COURT: Okay.

20 MR. THOMAS: So if it please the Court, we would call
21 Mr. Thomas Slovenski to the stand.

22 THOMAS SLOVENSKI, having been
23 first duly sworn, testifies as follows:

24 MR. THOMAS: If it would please the Court, Your Honor.

25 THE COURT: Yes, sir.

1 THE COURT REPORTER: I need him to spell his name.

2 THE WITNESS: Thomas Slovenski.

3 THE COURT REPORTER: Spell the last name.

4 THE WITNESS: S-l-o-v-e-n-s-k-i.

5 MR. THOMAS: And Your Honor, if it please the Court,
6 we will be looking at pages 136 through 163, which is the
7 Verizon Wireless information, and ATF also testified, and
8 that is 147 to 163, Your Honor. So I guess Verizon is 136
9 through 147, and it continues from 147 to 163.

10 DIRECT EXAMINATION

11 BY MR. THOMAS:

12 Q Mr. Slovenski, you -- what is -- what is your
13 business?

14 A The name of my business is "Cellular Forensics, LLC."

15 Q All right, sir. And how did you get into that
16 business?

17 A I was a police officer for 15 years. Most of my time
18 served here in South Carolina before I retired and went
19 into private practice.

20 In 2007, I saw the need of phone forensics, mobile
21 phone forensics in South Carolina. I proceeded to receive
22 the certification and training. Out of my own pocket, went
23 to -- up to Perdue University, met with Dr. Rick Mislán who
24 instructed me and certified me in mobile phone forensics.

25 From then I proceeded, in 2009, to become certified in

1 cell tower mapping and forensics and then I also was re-
2 certified in 2011 and then was certified last year as a
3 subject matter expert by the ZetX Corporation.

4 Q All right, sir.

5 THE COURT REPORTER: I'm sorry. What corporation?

6 THE WITNESS: ZetX, Z-e-t-x.

7 Q And as a result, do you -- you continue an educational
8 process in regards to cell phone technology?

9 A Yes, sir. All the time.

10 Q And -- and what type of continuing education are you
11 doing?

12 A Just last year alone I had over 90 hours of continuing
13 education specifically in cell towers and the reading of
14 their data and the mapping techniques. This year I am
15 repeating that. Actually next week I'm going to be in
16 Boston, Massachusetts, and at that time I'll receive 40
17 hours training for my re-certification as a subject matter
18 expert with ZetX.

19 Q All right, sir. And you live in South Carolina?

20 A Yes, sir.

21 Q Have you testified before as an expert in the courts
22 of South Carolina?

23 A Yes, sir.

24 Q And do you know off hand how many times?

25 A As an expert witness I've been certified four times.

1 Q All right, sir.

2 MR. THOMAS: And Your Honor, at this point in time, we
3 would like to ask the Court to qualify Mr. Slovenski as an
4 expert in the field of mobile phone forensic ...

5 THE COURT: Any objection?

6 MS. COLEMAN: I have no objection.

7 THE COURT: The witness will be admitted as an expert
8 in mobile phone forensics without objection.

9 MR. THOMAS: Thank you, Your Honor.

10 Q Mr. Slovenski, you've had an opportunity to look at
11 the transcript in this case of Mr. John Upson?

12 A Yes, sir, I have.

13 Q All right, sir. And the testimony in this case was
14 basically from Verizon Wireless and also ATF?

15 A Correct.

16 Q And why was ATF involved?

17 A It is my understanding that the arresting agency, the
18 local arresting agency, requested ATF to do the cell tower
19 examinations.

20 Q All right, sir. And there is testimony in the -- in --
21 -- in the transcript regarding the ATF and their
22 conclusions; is that correct?

23 A Correct.

24 Q All right, sir. And you have looked at all of that?

25 A Yes, sir.

1 Q And addition, were you able to obtain data from ATF or
2 from the County in regards to this case?

3 A Yes. I received directly from ATF Agent Frasier, the
4 call detail records needed in this case.

5 Q Were you able to determine if that information that
6 you received was the same information that the -- the State
7 had in their trial of Mr. Upson?

8 A Yes, sir.

9 Q And it was the same information?

10 A Same data.

11 Q Okay. Now, as a result of obtaining that information,
12 what did you do?

13 A Well, in my analyzation of it, I make sure, first of
14 all, that it is verified as being from Verizon itself.

15 Q Yes, sir.

16 A I then take the records, and using a proprietary
17 software produced by the ZetX company, of which I'm an
18 expert in, I then converted the call detail records from
19 Verizon into a mapping data plot of every tower that was
20 transacted on the Verizon system between the dates and
21 times that were given to me.

22 Q All right. And what are you looking for?

23 A Basically, what I was doing was I took the incident
24 location and I plotted that. I then did my own independent
25 investigation using my mapping system -- which, by the way,

1 has passed numerous Daubert and Frye standards in courts in
2 America -- and I took my data and looked to see if any of
3 it -- the -- the cell towers, the readings, the radio
4 frequency coverage encompassed the incident location.

5 Q All right. Let me ask you this, since we're taking
6 you a little bit out of turn, just for the Court's
7 information, what incident location were you looking at?

8 A It was the Captain D's located on 1907 Whiskey Road.

9 Q All right. And what time frame are we talking about
10 as far as this data?

11 A From my understanding, the incident location -- or at
12 the incident location, the incident took place around --
13 correct me please, it was around 22:40/22:47 I -- I -- I
14 may believe.

15 Q And this was -- and this was the time frame that you
16 were looking for the cell phone data?

17 A Right. And I looked at the calls before and after the
18 incident.

19 Q All right, sir. And in looking at that information,
20 what were your conclusions? What were you able to
21 determine?

22 A Well, I can tell you that there were no registered
23 calls made that encompassed the incident location at the
24 incident date and time.

25 Q Right. Which means what?

1 A Well, that the phone was not in use at a time of the
2 incident location that would show it in the area --
3 specific area of the Captain D's.

4 Q So we're not -- so what we're saying is that the --
5 the phone that was allegedly used by Mr. Upson, we're
6 talking about the -- the location of that phone.

7 A Correct.

8 Q Okay.

9 A The approximate location.

10 Q All right. And in the -- the testimony that you have
11 reviewed that was presented by Verizon Wireless -- Wireless
12 and the ATF, is that information confusing?

13 A Yes, depending on the map. They produced -- ATF
14 produced numerous maps --

15 Q Yes, sir.

16 A -- and I have some professional problems with some of
17 the mapping that they did of the data.

18 Q Okay. And -- and the purpose of their presentation
19 was to show Mr. Upson was in that area where the Captain
20 D's location --

21 A I believe so.

22 Q Okay. All right. And I apologize, I'm not a cell
23 phone expert. I can turn mine on and turn it off, but you
24 certainly know more about this than -- than I do.

25 Now, what kind of process did ATF go through in

1 regards to analyzing the cell phone data? Did they use a
2 software program?

3 A Yes, they did. They used one that's called PenLink,
4 P-e-n-l-i-n-k. PenLink is a good system in and of itself;
5 however, I have, in my experience, in analyzing PenLink
6 cases, in -- we've found where PenLink is dependant a good
7 bit -- it's accuracy a good bit is dependant on the person
8 who's actually using PenLink.

9 Q Right. And is there a better software?

10 A Oh, yes, sir. There is.

11 Q And what software is that?

12 A That is from the ZetX Corporation. It's called TraX,
13 T-r-a-x. I've been using that software now for a couple of
14 years. It's the one that I'm certified in.

15 What happened is in my own professional career, the
16 old methodology of plotting towers was not serving those of
17 us in the independent -- and -- and in law enforcement
18 community proficiently and so I went on my own expedition
19 to find the better mousetrap. And out of all of the ones
20 that are offered out there, even to law enforcement, state,
21 federal, and local, the best one that I found for accuracy,
22 ease of use, and ease of explanation in the court of law
23 and that passes Frye and Dauberts's standards is the TraX
24 software produced by the ZetX Corporation.

25 Q So when you took the same data that the State had --

1 A Yes.

2 Q -- and you ran it through your software --

3 A Yes.

4 Q -- was your conclusion different than what was
5 presented at court by ATF?

6 A It depended on the map. On a couple of the maps they
7 look like they got it correct, but then, like, there's one
8 here that I can show you that it's an anomaly. I ---

9 Q Well -- well, why don't you ---

10 A --- don't know what they're trying to say.

11 Q --- walk us through it 'cause -- 'cause you know --
12 'cause again, I'm not a cell phone expert.

13 A Sure. Okay.

14 Q Tell us what you did.

15 A Okay. In -- after doing my own independent
16 examination, all right, I then compared apples to apples.
17 I took their maps and I took my maps, okay?

18 What I first noted about their maps -- now, in the
19 digital forensics community, there is a national standard
20 which is purported by the National Institute of Standards
21 and Technology, that's NIST. NIST says it, we go by it.
22 NIST said, in 20 -- in 2002, that data has to be verified,
23 digital data has to be verified. Whether it's computer
24 data, cellular data, tower data it has to be verified.

25 I did not see any testimony where the ATF nor the

1 county agency that arrested Mr. Upson did any verification
2 of their data. In fact, the maps that were produced by ATF
3 lacked several things that are known as "best practices" in
4 the forensic community such as no names on the -- on most
5 of the maps. In other words, who produced this map? What
6 date did you produce it? What's -- number is it in
7 reference to? There's no telephone number showing it was
8 the phone that was supposedly linked to Mr. Upson.

9 So what we're looking at are maps that are very
10 general in nature, but in the forensic community, you got
11 to be very specific, okay?

12 Q Especially if you're trying to show that he was at the
13 incident location.

14 A Exactly. Yes. I was hoping there would've been an
15 overhead projector because then I could show you -- I could
16 compare and show you ---

17 Q You've got the written maps ---

18 A Yes, sir. I -- I sure -- yeah. I ---

19 Q These are the same maps that you provided me and also
20 provided Ms. Coleman.

21 A Exactly.

22 Q All right.

23 A Yes.

24 Q Would you -- maybe the best way to do it is could you
25 take your maps, tell us what you found in your maps, and

1 then we can take them and introduce those and show them to
2 the Court.

3 A Fantastic. Okay.

4 Q All right.

5 A I have these three maps. These are the ones from ATF,
6 the State, okay? And I have labeled them 1, 1(a), and 1(b)
7 because they're all related to what I'm trying to say. And
8 that is, like, in this instance here, and in the one behind
9 it in 1(a), the Captain D's will be noted with one point.
10 Well, instead of the description of the Captain D's ---

11 Q So the Court can see them.

12 A So in -- I can show Your Honor. May I stand?

13 THE COURT: Yes, sir. Go ahead.

14 A Okay. (Indicating) Right here, Your Honor, we have
15 the point of Captain D's, okay? Then they put that all the
16 way up there. Now, if you're a layman, you're going to
17 assume that the Captain D's is closer than what it actually
18 is. Same thing on 1(a), Your Honor. You'll see where
19 there is the location of Captain D's, but now they're
20 saying, "Okay. His phone was in this area," and it appears
21 that it's in the area of Captain D's. If a layperson were
22 to look at that -- 'cause there's, like, no arrow or
23 anything going, "Hey, this is really where Captain D's is.
24 It's not up here."

25 (Indicating) Then here's another one, Your Honor, I

1 have it labeled as 1(b), where I took their map and now
2 this is my map. You'll notice that it's not in a pie
3 shape, but in a circular-like format. This is the template
4 that we use because this is more accurate in how a cell
5 tower actually emanates the radio frequencies from that
6 tower. It doesn't go in straight lines, Your Honor, and it
7 doesn't end in a half circle.

8 What it does is you have, actually, rear lobes, side
9 lobes, and front lobes to the radio frequency. Radio
10 frequency isn't very, like, direct, so to say. It emanates
11 and goes out in waves, and that's why we use the term
12 "estimate" because could he have been a little bit out of
13 here here? Yes. Could he have been more in toward the
14 area -- this area here? Of course. But of course, his
15 phone could have been anywhere in here (indicates.)

16 Now, how did we get this particular area of coverage?
17 That is because in our databases, we have 3.5 million
18 towers and their metadata. Every time an examiner, whether
19 it's the police or a private one like myself, submits our
20 data to the ZetX Corporation and there's accompanying tower
21 location sheets, we submit that also and ZetX, with their
22 program, will continually verify their data to make sure
23 that it would be accurate.

24 (Indicating) So in 2013, this tower was emanating into
25 this type of direction, and it'll stop or end near a

1 particular area because of other towers that would be in
2 the area. Cell towers work just like their name says.
3 They have coverage one over the other. So if you're
4 proceeding down I-20, as you're moving, your phone is
5 looking for three to four additional towers because the
6 last thing that the cell tower company or the -- the
7 provider wants is for you to drop a call. You drop a call,
8 you're going to be looking for another company and that's
9 losing customers.

10 So what they do is they will put their towers,
11 especially in an urban area, where they are prolific and
12 can compliment each other so that as someone is moving with
13 their phone, the coverage is not broken.

14 Q So let me ask -- so those -- those are the maps, the
15 cell phone maps, that were obtained from the State?

16 A Yes. Uh-huh.

17 Q All right. And are they -- are they accurate after
18 you had an opportunity to review them?

19 A No.

20 Q Okay. All right.

21 A I ---

22 MR. THOMAS: Your Honor, if it please the Court, we'd
23 like to go ahead and just move those in as Applicant's 1,
24 and I guess we will mark them as he referred to them as
25 being -- was it "A, A1, and A2?"

1 A 1, 1(a), and 1(b).

2 Q All right.

3 THE COURT: All right. Let Ms. Coleman look at them.

4 MS. COLEMAN: Are these just the maps that the State
5 created ---

6 MR. THOMAS: Yes, they are.

7 MS. COLEMAN: --- that they presented at trial?

8 MR. THOMAS: Yeah.

9 THE WITNESS: Then that map that I sent you is on --
10 is 1(b).

11 MS. COLEMAN: Okay. Thank you. No objection.

12 THE COURT: All right. So this is Applicant's No. 1.
13 Is that ---

14 MR. THOMAS: Yes, sir. I think there are ---

15 THE COURT REPORTER: You said 1, 1(a), and 1(b).

16 MR. THOMAS: 1, 1(a), and 1(b).

17 THE COURT: 1, 1(a), and 1(b) would be admitted
18 without objection.

19 MR. THOMAS: Yes, sir. Thank you, Your Honor.

20 (Applicant's Exhibit Nos. 1, 1(a), and 1(b), maps, in
21 evidence.)

22 MR. THOMAS: And I have learned, over the years, to
23 wait for the Court Reporter, Your Honor, rather than just
24 starting off again.

25 Q Mr. Slovenski, did you have an opportunity to produce

1 your own maps?

2 A Yes. I -- I have another one here.

3 Q Okay. And what difference were you -- what
4 difference, if any, were you able to determine between the
5 State's evidence and what you were able to -- to find?

6 A Well, like I mentioned, there's the ambiguity in what
7 the State produced ---

8 Q Yes.

9 A --- in that you -- if it didn't have Mr. Upson's name
10 at the top, you wouldn't have known what it was referring
11 to because there was no number to which it was referring
12 to or necessarily the date and time. Such is an example
13 right here, if I may?

14 Q Yeah -- yes, sir.

15 A Okay. (Indicating) This I have labeled as 2 and 2(a)
16 because they're related to each other.

17 Q And these are copies that you -- this -- these are the
18 same that you sent me and sent ---

19 A Right.

20 Q --- and the Solicitor?

21 A Exactly. Yes.

22 Q Okay.

23 A You and Ms. Coleman got a copy of this. If I may,
24 Your Honor?

25 THE COURT: Yes, sir.

1 A Okay. (Indicating) What we have here, Your Honor, is
2 this is the State's, okay? And now they don't have it
3 marked, but we're going to assume that that's Captain D's,
4 okay? So there again, we've got some ambiguity.

5 Also you can't tell here which sector they're
6 referring to. Like, if you look at this here (as read):
7 "Call starts here/Call ends here."

8 (Indicating) Now, if you look at the map I produced,
9 Your Honor, right here, there's Captain D's, I have it
10 marked; but you'll notice that how their coverage comes
11 down here, we find ours to be more accurate and it shows
12 less coverage in this lower region where they're showing,
13 you know, basically him on the -- or I'm sorry, his device
14 very near the Captain D's. And the -- this was where they
15 did it from 11/27 of '13 from 21:07 to 21:47. I did the
16 exact same thing, Your Honor, and I'm seeing an inaccuracy
17 there.

18 THE COURT: Okay.

19 THE WITNESS: Okay.

20 MR. THOMAS: Your Honor, and I guess at -- at this
21 point, we would move to introduce those -- let me ask --
22 Applicant's 2 and they're marked as what? I'm sorry, Mr.
23 Slovenski.

24 A 2 and 2(a), sir.

25 MR. THOMAS: 2 and 2(a)?

1 A Uh-huh.

2 MS. COLEMAN: No objections.

3 THE COURT: All right. Applicant's 2 and 2(a) would
4 be admitted without objection.

5 (Applicant's Exhibit Nos. 2 and 2(a), maps, in
6 evidence.)

7 DIRECT EXAMINATION

8 BY MR. THOMAS:

9 Q Now, Mr. Slovenski, make sure I understand this
10 correctly. What you're saying is that the map that was
11 produced by the State, or for the State, shows Mr. Upson
12 potentially closer or at Captain D's when your analysis of
13 it does not show him as close as that other map does?

14 A That is correct.

15 Q All right, sir. Now, is that -- are those all the
16 maps that you have as far as your analysis or ---

17 A No. If I may, I have one more that I would like to --

18 Q Okay.

19 A -- produce for Your Honor.

20 (Indicating) What this one shows, Your Honor, is I
21 took the very last call that -- or as we call it "traffic."
22 Verizon will only give you the calls. They won't give you
23 the texts, they won't give you the data. They'll only tell
24 you, okay, either sent or received a call.

25 Now, you'll notice, sir, that that call happened at --

1 excuse me, sir. Let me get my glasses on here -- 21:49.
2 I'm sorry. 21:48, Your Honor. Okay? It starts here on
3 this tower which is labeled "87." 87 is the line -- the
4 specific line of the Verizon data. That's how we map it so
5 that if we come into court, we can take the actual CDR
6 Verizon and we can say, "Your Honor, right here, line 87.
7 And then you can go right across and it'll say "Date/Time"
8 and you could see how we're plotting. We're actually
9 apples to apples, okay?

10 (Indicating) Now, you'll notice that it starts in this
11 area and it ends in this area. What I want to point out to
12 Your Honor, is right here. Do you see where it overlaps?
13 It leads me to believe, in my education and experience of
14 over a decade of doing this, that his phone was most likely
15 in this area here because he's progressing, okay?

16 The fact that he was on this tower, yes, this is the
17 coverage of that tower, but where it now is overlapping
18 each other, it is my experience that his phone most likely
19 was in there at that date and time, and that's the last
20 call registered before the incident.

21 (Indicating) Now, here's the State's, and there's
22 ambiguity again. We don't know, "Okay. What's it
23 referring to?" And they don't account for this area here
24 of overlap, and that's what's one of problems that we
25 found.

1 This is an old system that we all started out with,
2 but now it's making its way out of the courts because it
3 has not been shown scientifically viable to pass Daubert
4 and Frye where this new method has.

5 And by the way, this new method here of radio
6 frequency density is taking law enforcement by force. Many
7 of them throughout the Upstate are already using this
8 system, and I'm sure you're going to start seeing it more
9 and more coming into your courtrooms, where this is being
10 avoided. ATF, Secret Service, IRS they all use this same
11 software now. And I'm -- I'm a trainer for ZetX, and we
12 are seeing a great number of major police departments --
13 Miami Dade, LAPD -- who are using the same software and
14 it's because this is outdated and inaccurate. We have
15 areas that it's missing.

16 MR. THOMAS: Your Honor, it if would please the Court,
17 we'd like to introduce that as Applicant's 3. It's just --

18 -

19 THE WITNESS: 3 and 3(a).

20 MR. THOMAS: 3 and 3(a), yes, sir, Your Honor.

21 THE WITNESS: Yes.

22 THE COURT: Okay.

23 Q And this is one of the documents that you provided
24 earlier to Ms. Coleman?

25 A Yes.

1 Q Okay.

2 A Uh-huh.

3 MS. COLEMAN: No objection.

4 THE COURT: So Applicant's 3 and 3(a) would be
5 admitted without objection.

6 MR. THOMAS: Thank you, Your Honor.

7 (Applicant's Exhibit Nos. 3 and 3(a), maps, in
8 evidence.)

9 Q All right. Mr. Slovenski, let's -- let me ask you
10 this question -- your opinion about this. You've read the
11 transcript, and you've seen -- you've read the testimony of
12 Verizon and -- and the individual from ATF. Actually,
13 that's the same person that you got the information -- got
14 your data from ---

15 A Yes, Agent Frazier.

16 Q --- who testified.

17 Now, was there a cell phone expert hired by the
18 Defense in this case?

19 A Not that I could see in any of the documentation
20 provided to me.

21 Q And do you think it would have benefitted Mr. Upson
22 for the State to have hired a cell phone expert?

23 A Yes, sir.

24 Q And why do you believe that?

25 A Well, there again there was no verification until I

1 came along and started taking their maps and -- and taking
2 my maps, and trying to verify the data and you could see in
3 adequacies of their data. And hiring an outside expert,
4 one that does that for a living -- which Agent Frazier,
5 now, she assists other agencies and while she's assigned to
6 do so, but it's -- you always want to have, as -- as we
7 teach, peer verification. Get peer reviews, get another
8 examiner to look at what you've done, and to verify your
9 data to make sure that you did it just right. You've got
10 your times right, the time zones, the -- the conversion
11 from UTC to Eastern Standard Time that sort of thing, and
12 then the actual mapping itself.

13 Q Okay. And without an attorney actually having
14 knowledge of cell phone technology, would that prevent them
15 from being able to ask the appropriate questions --

16 A Oh, of course.

17 Q -- to show these irregularities or ---

18 A Of course. That's why my agency has been providing
19 free training for attorneys throughout South Carolina, and
20 we continue to do so.

21 Q And see if I can format -- format this question
22 properly: In your opinion, the way that the cell phone
23 information was presented to the jury by ATF and by Verizon
24 --

25 A Uh-huh.

1 Q -- would it have been persuasive in regards to showing
2 that Mr. Upson was at Captain D's?

3 A Yes.

4 Q Okay. And is that in fact true?

5 A I cannot confirm any data that shows Mr. Upson's
6 cellular device being used at or in the immediate area of
7 Captain D's at the time of the incident.

8 Q Right. And I have one further question. I think in
9 our conversation, you mentioned to me that there was
10 actually another cell phone tower that you found.

11 A Well, there's towers all around that incident
12 location.

13 Q Okay. And there was one, I think, that you had said
14 was closer to Captain D's?

15 A Yes. What I did is I took -- I have the ability to
16 take the incident location's address and to proceed to plot
17 all the cell towers in a 20-mile radius of that location:
18 Verizon, AT&T, T-Mobile, Sprint.

19 And what I did was just take the Verizon towers and
20 plot them on a map and showed where they were in regards to
21 the proximity of the Captain D's.

22 Q Right. Then were you able to determine if Mr. Upson's
23 phone ever pinged off of that tower?

24 A There is no data to support it pinged off that closer
25 tower.

CROSS-EXAMINATION BY MS. COLEMAN - THOMAS SOLVENSKI

1 Q All right.

2 MR. THOMAS: Your Honor, if I can beg the Court's
3 indulgence just for a second.

4 (Brief pause.)

5 MR. THOMAS: Your Honor, I have no further questions.

6 THE COURT: All right. Ms. Coleman?

7 MS. COLEMAN: Thank you, Your Honor.

8 CROSS-EXAMINATION

9 BY MS. COLEMAN:

10 Q Mr. Solvenski, how are you?

11 A I'm fine.

12 Q Good. You're obviously well-versed in the newest
13 technology on cell phone records and -- and forensics and
14 everything you've testified to today; is that right, in
15 your opinion?

16 A I try to stay up as much as possible.

17 Q Right.

18 A It's vast.

19 Q And you've been doing this for several years, right?

20 A Yes, ma'am.

21 Q Okay. Are you familiar with what this technology
22 would've looked like in 2013?

23 A In 2013, the methodology that was used at that time
24 would have been very close to what ATF used.

25 Q Okay. And is that the PenLink system?

CROSS-EXAMINATION BY MS. COLEMAN - THOMAS SOLVENSKI

1 A Yes.

2 Q Okay. So if you had been running this -- the -- the
3 same data back then, you would've used the PenLink system?

4 A No

5 Q Okay. Would you have used TraX or a different
6 program?

7 A TraX never hit the market until January 1, 2015.

8 Q Okay. What would you have used in 2013?

9 A I would have used a manual system of plotting. It is
10 very lengthy, but what we would do is we would have to
11 resort to basically the pie method because that was all
12 that was available at that time.

13 But in reviewing the data that I've done here and
14 shown to the Honor -- Your Honor and provided to you all,
15 there still would have been questions over the coverage on
16 some of the -- of the towers that were done.

17 PenLink is not in and of itself infallible. That's
18 why you have to always verify your data.

19 Q Was it common for -- for PenLink to be used by law
20 enforcement agencies in 2013?

21 A The Federal, yes.

22 Q Okay. And you testified that they typically received
23 training on using that program?

24 A Yeah. They would.

25 Q Okay..

CROSS-EXAMINATION BY MS. COLEMAN - THOMAS SOLVENSKI

1 A I can't confirm that Ms. Frazier did ---

2 Q Right.

3 A --- but I would've hoped that they would've.

4 Q Right. Did the State -- to your knowledge, based on
5 your review of the transcript and the testimony, did the
6 State ever say that the records showed that he was at
7 Captain D's at the time of the crime?

8 A I'm trying to think. There was a -- and I'd have to
9 get the entire transcript out.

10 Q But do you recall off the top of your head?

11 A Nothing saying he was at Captain D's.

12 Q Okay. Do your records now show that he was somewhere
13 else at the time of the crime?

14 A I can only show what the data shows. The data shows
15 him, prior to the incident location, in another area than
16 the immediate vicinity of Captain D's.

17 Q Okay. But there were no phone calls made at the time
18 of the crime; is that right?

19 A Not that were reported by Verizon.

20 Q Okay. Now, the phone -- tell us a little bit about
21 how the phone works. You can only collect data from when
22 the phone is in use; is that right?

23 A After ---

24 Q Or from -- from this data that was collected?

25 A Right. The CDR's, Call Detail Records, that are

APP'X 403

CROSS-EXAMINATION BY MS. COLEMAN - THOMAS SOLVENSKI

1 supplied to law enforcement when a warrant is issued --
2 like the gentleman here that issued the -- the warrant to
3 AT&T that I have a copy of, okay, William Royster III, oka
4 -- they will only produce for you what you request, and
5 you have to request it in the particular format that it
6 normally comes in and every provider is different, okay?

7 I did note that Mr. -- I want to make sure I pronounce
8 his name right -- Royster did not ask for what we call
9 "PCMD" records, which is Per Call Measurement Data. That
10 was not asked for nor was it produced to me. So therefore
11 I would assume that they never got it. That is one of the
12 things that we try to verify ---

13 Q Uh-huh.

14 A --- because PCMD is -- and -- and I'm getting to your
15 -- to answer your question.

16 Your phone is continually talking to a tower. I've
17 been asked by many individuals, "Can you get that
18 information? Where was it on this second?" No. Because
19 the cell tower -- or the cell service providers do not keep
20 that data. When we've asked them why they don't, they say,
21 "It's due to lack of data storage." It would be immense
22 data farms to keep every minuscule data about that phone
23 and its location.

24 However, your phone, during the course of, say, 15
25 minutes, will be pinged whether you're using it or not as

CROSS-EXAMINATION BY MS. COLEMAN - THOMAS SOLVENSKI

1 long as it's turned on by your cell service. That's the
2 PCMD hits. So what we ask as professionals when we get a
3 case is, "Was there PCMD data?" Why? Because if you
4 analyze it, it is a slew of data, but if you know what
5 you're looking for, you can find accurate pinpoints where
6 you can come down in the -- from the stratosphere, so to
7 speak, with the program and look at the actual road that
8 the person was traveling on --

9 Q Uh-huh.

10 A -- and what mile marker they were at. I've had cases
11 involving that, and so has law enforcement all the time.
12 That's why we're encouraging them to get the PCMD data --

13 Q Uh-huh.

14 A -- because it's a very accurate show of pinpoint
15 locations.

16 However, when it comes to call detail records that law
17 enforcement has for years been asking for, all Verizon will
18 give you are the calls, whether received or sent, and that
19 is it with the time, date, tower used, sector of the tower,
20 the middle angle or the azimuth of that tower; and then
21 sometimes, depending on the provider, you'll get other
22 additional metadata that we feed into the system and then
23 utilize.

24 Q Okay. So the PCMD data you were just talking about
25 that tracks every 15 minutes or so, you testified that the

CROSS-EXAMINATION BY MS. COLEMAN - THOMAS SOLVENSKI

1 companies do not store that data? Or they -- how long a
2 period of time do they store it?

3 A (Coughs) Excuse me.

4 Q Uh-huh.

5 A PCMD data is kept, depending on the cell phone
6 company, upwards to seven days.

7 Q Okay.

8 A Now, what I did check is I checked the date of the
9 warrant that Mr. Royster did in regards to the seven days,
10 and it appears to me he had sufficient time; however, he
11 many not have known it existed either.

12 Q Okay. Are you aware specifically of Verizon's policy
13 on how long they keep their records?

14 A Yes. They will keep call detail records seven years.

15 Q Okay. What about the PCMD thing?

16 A PCMD's? No more than seven.

17 Q Okay.

18 THE COURT REPORTER: No more than ...?

19 THE WITNESS: Seven. Yes, ma'am.

20 Q So in this case, the data that they collected from
21 Verizon included just the call detail records, right?

22 A That is correct.

23 Q Do you have any -- are you disputing any of the
24 accuracy of the -- the call details of the numbers
25 themselves as far as the telephone numbers that called

CROSS-EXAMINATION BY MS. COLEMAN - THOMAS SOLVENSKI

1 this phone or the numbers that he called -- that someone
2 called from this phone?

3 A I did not look at each specific number and figure out
4 who was who. You know, who's this number, who's that
5 number. I looked at the actual activity.

6 Q Okay. Was there any reason for your to dispute or --
7 or try to verify the accuracy of the numbers themselves?

8 A No. I ---

9 Q Okay.

10 A I wasn't ---

11 Q You were just looking at the cell phone towers?

12 A Yes. I was not requested to do that.

13 Q Okay. So again, the cell -- the -- the data that
14 you're talking about here, the call detail records, they
15 show the exact tower that's in use when -- when the phone
16 is making a phone call in this data; is that right?

17 A Yes, ma'am.

18 Q Okay. And there is -- there was no data in here that
19 was made at the time of the crime showing a certain cell
20 tower?

21 A Not on the voice side.

22 Q Okay. Now, this -- this data just shows the phone,
23 right? It shows what the phone is doing, not Mr. Upson,
24 right?

25 A That is correct.

CROSS-EXAMINATION BY MS. COLEMAN - THOMAS SOLVENSKI

1 Q So you -- you don't know who has his phone, if he has
2 it or where he is, if he's with a friend ---

3 A No, ma'am. And that is why we always ask -- in the
4 verification process, we encourage law enforcement
5 agencies go out and look for verifying data. Whether it's
6 cameras in a -- I'm sorry -- like a QT or a civilian that
7 might have a security camera outside their house. If
8 there's an alibi, you need to check the alibi to see if
9 it's truthful or not because a lot of -- because all the
10 cell towers are going to tell you is the activity of that
11 phone.

12 Q Uh-huh.

13 A And if you're trying to put the phone in someone's
14 hand, you're going to have to have other data --

15 Q Uh-huh.

16 A -- many times.

17 Q Okay. Now, in this case, you mentioned alibi. Mr.
18 Upson presented an alibi defense at trial claiming that he
19 was at a comedy show and at a club -- a nightclub after
20 the show.

21 A Uh-huh.

22 Q From somewhere -- and the testimony showed somewhere
23 maybe from 10:30 to 11 p.m. and later. Do your maps show
24 him at a particular location after the time of the crime

25 A After the time of the crime, the -- I -- I didn't

CROSS-EXAMINATION BY MS. COLEMAN - THOMAS SOLVENSKI

1 bring it with me nor did I produce for you, but from my
2 recollection, there was activity southwest from the
3 Captain D's.

4 Q Okay. And did you plot the location of the nightclub
5 in your analyzation?

6 A I wasn't asked to, but yesterday, for fun -- I
7 shouldn't say, "For the fun of it." But no, just -- just
8 -- you know, I'm always thinking.

9 Q Uh-huh.

10 A I went ahead and plotted it.

11 Q Okay.

12 A And it appears that his phone was -- the tower he
13 used, the coverage encompassed the nightclub.

14 Q Okay. But it could have been elsewhere, right,
15 within that vicinity?

16 A Correct. Yes.

17 Q Nothing further. Thank you.

18 MR. THOMAS: Your -- Your Honor, if I may. Just a
19 couple questions.

20 REDIRECT EXAMINATION

21 BY MR. THOMAS:

22 Q Counsel asked you about the technology back in 2013.

23 A Uh-huh.

24 Q And I think you said that PenLink was -- was used --

25 A Uh-huh.

1 Q -- but that there were known problems with the
2 accuracy of PenLink?

3 A PenLink's accuracy depends on the analyst. I have --
4 I had one case in particular out of Missouri. I won't go
5 into detail other than PenLink had been used in the case
6 by the prosecution, and I found numerous problems where
7 data was either added or missing, depending on the -- the
8 time frame. And you know, in my analysis, I was able to
9 show inaccuracies.

10 Q All right. So had you done this back in 2013, you
11 would've -- if you had used PenLink, you would've manually
12 checked it?

13 A You have to.

14 Q Have to.

15 A You have to do that with any program.

16 Q Okay. All right. And counsel asked you, too, about
17 -- well, in the testimony at trial, there wasn't -- there
18 may not have been testimony that the phone showed Mr.
19 Upson at Captain D's, but the -- what was -- the purpose
20 of introducing the cell phone data -- the purpose had to
21 be to show that he was in the area of Captain D's.

22 A I believe that's what they were trying to do.

23 Q Okay. All right. And they were using this phone --
24 she -- Counsel asked you a question, "Well, that shows
25 where the phone is, not necessarily where the person is."

1 but again, in the State's presentation of this case, would
2 they not have been trying to use the phone to show that
3 Mr. Upson was in the area of Captain D's?

4 A I would think so.

5 Q Okay. Now, with a cell phone, it can potentially
6 show you movement when it's just in essence pinging off of
7 different towers?

8 A Correct.

9 Q And that is because of why?

10 A That is because the towers will overlap each other in
11 their coverage so as to provide a uniform sense of
12 coverage to the user as they're traversing through the
13 neighborhood, on the road, highways, etc.

14 Q All right. Doesn't necessarily mean that your phone
15 moved anywhere.

16 A Well, depending on the provider, you could be at this
17 side of the courtroom on one tower and then go to that
18 side of the courtroom and hit another tower.

19 Q Okay.

20 A But there again, depends on the provider.

21 Q So it's based upon availability of -- of ---

22 A Of the towers.

23 Q --- of the towers.

24 A Yes. If a tower is down because of updates or it got
25 hit by lightening, something knocked out that tower, then

1 the cell tower -- or the cell phone provider has got to
2 then shift you onto other towers.

3 Q Okay.

4 MR. THOMAS: I have no further questions, Your Honor.

5 THE COURT: Anything further from this witness?

6 MS. COLEMAN: Nothing further.

7 THE COURT: All right. Any objection to this witness
8 being excused?

9 MR. THOMAS: I have no objection, Your Honor.

10 MS. COLEMAN: No objection.

11 THE COURT: All right. Thank you, sir. You are
12 excused.

13 THE WITNESS: Thank you, Your Honor.

14 (The witness exits the stand.)

15 MR. THOMAS: Your Honor, if it please the Court. We
16 could go back to the beginning now, and call Mr. Upson to
17 the stand.

18 THE COURT: Okay. Mr. Upson, come on up.

19 And Mr. Thomas, if he needs any assistance with the
20 paperwork, I know you mentioned that earlier, I'll allow
21 you to come up and assist ---

22 MR. THOMAS: Okay.

23 THE COURT: --- assist your client.

24 MR. THOMAS: All right. Thank you, Your Honor.

25 JOHN LYDON UPSON, having been

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1 first duly sworn, testifies as follows:

2 THE WITNESS: John Lyndon Upson. L-y-n-d-o-n U-p-s-
3 o-n.

4 MR. THOMAS: Your Honor, if it please the Court?

5 THE COURT: Yes, sir.

6 DIRECT EXAMINATION

7 BY MR. THOMAS:

8 Q Mr. Upson, you're currently incarcerated in the South
9 Carolina Department of Corrections?

10 A Yes, sir, I am.

11 Q Okay. And what are you serving time for?

12 A Three counts of kidnaping, one count of armed
13 robbery.

14 Q Okay. Now, how much time are you serving?

15 A Twenty years consecutive for all three -- for all
16 three offenses. Excuse me ---

17 Q Concurrent?

18 A --- that's two counts of kidnaping. I said three,
19 but the one indictment was dropped.

20 Q All right. So what's your total sentence?

21 A Twenty years ---

22 Q Twenty years.

23 A --- sir.

24 Q Okay. And are you 85 percent?

25 A Yes, sir, I am.

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1 Q What's your max-out date?

2 A Sometime in 2030, I believe it is.

3 Q Okay. How old will you be when you get out?

4 A About 59 years old.

5 Q All right, sir. Now, you understand that you're here
6 today asking for the Court to grant you a post conviction?

7 A Yes, sir. I am.

8 Q And you and I've discussed that you understand that
9 you have ceratin exposure should that be granted, that you
10 will get a new trial -- you could get a new trial?

11 A Yes, sir.

12 Q And should you go back to trial, that it's possible
13 that you could get more time than 20 years?

14 A Yes, sir.

15 Q You understand that?

16 A Yes, sir, I do.

17 Q And you wish to go forward today?

18 A Yes, sir, I do.

19 Q Okay. Now, Mr. Upson, since Counsel is not here, let
20 me ask you if you would very briefly just tell us what did
21 they say that you did?

22 A They claim that I robbed Captain D's and in the
23 process of the robbery, they said that it's kidnaping
24 involved with the employees of Captain D's.

25 Q And how did they say you kid -- you would --

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1 allegedly kidnaped the employees?

2 A From my understanding the law in the State of South
3 Carolina, all you have to do is tell someone not to move
4 and that's kidnaping.

5 Q All right. And your -- you had a defense by saying
6 that you were not at Captain D's?

7 A Yes, sir. I had a alibi -- alibi defense. I had
8 three witnesses to come to court to testify on my behalf.
9 Vernon Wright, Jeanene Williams and Ms. Walker came to
10 testify.

11 Mr. Vernon Wright is -- Vernon Wright is a 15-year
12 veteran of Aiken -- Aiken County as a lieutenant at the
13 detention center. Ms. Walker, she works at a convenience
14 store. Also Ms. Jeanene Williams, she works with the
15 Department of Social Services.

16 Q All right. And supposedly, what was -- well, what
17 was your activities that night? What did you do that
18 night?

19 A My activities that night, I left my mother's home,
20 went to help set up -- I have a friend, Ivory Renard
21 Corely, for the past six years, he throws a comedy show --
22 a comedy event for alumni of South Aiken and Aiken High
23 that's coming home for the Thanksgiving weekend. This
24 particular year, it was held at the Aiken Center of the
25 Arts -- or Aiken Art Center, right next to Lionel Smith on

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1 Richland -- (clears throat) excuse me -- on Laurens
2 Street.

3 And that's where the comedy show was held, and I -- I
4 helped prepare the show that evening. Also, Ms. Walker
5 testified that I helped her set up her table before the
6 show.

7 Q All right. So you were at the comedy show --

8 A Yes, sir.

9 Q -- from when to when?

10 A From eight 'til it was over. It started rather late,
11 so the exact time I won't say for sure at what time it
12 ended, but I know it was around maybe quarter to eleven.

13 We -- then we proceeded from there down to 100
14 Laurens Street is where we had the after party, and I was
15 there until it closed down.

16 Q Right. And do you know -- do you remember when they
17 said that this Captain D's was robbed?

18 A If I'm not mistaken, memory serves me correct, I do
19 believe that he said that the call came in -- I looked at
20 the call, the 9-1-1 call. I think they said around 10:30
21 or something like that of that nature, if I'm not
22 mistaken.

23 Q All right. And would it have been possible for you
24 to be at Mr. -- at Captain D's?

25 A No, sir.

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1 Q Okay. And that's why you were concerned about cell
2 phone data?

3 A Yes, sir.

4 Q Okay. Okay. Now, John, you were arrested and then
5 you were taken to the Detention Center. Were you ever
6 released on bond?

7 A Yes, sir, I was. First bond hearing I was denied.
8 90 days later I received bond.

9 Q All right. And did you retain counsel or was an
10 attorney appointed to represent you?

11 A Attorney was appointed to me.

12 Q Who ---

13 A Mr. ---

14 Q --- who was -- who was appointed?

15 A --- Mr. -- Mr. Andrew pSmith.

16 Q All right. And how 'bout Grant Gibbons? Was he ---

17 A Mr. Gibbons was, like, second chair. The only time
18 that I had -- well, when appointed with Mr. Smith, in that
19 back room there, Mr. Smith had told me that it was
20 conflict of interest and I asked him what was the conflict
21 of interest? He stated that he loves Captain D's.

22 So then I proceeded -- I wrote a letter, put on RE
23 Motion for refusal -- excuse me. RE for motion to dismiss
24 my attorney, Mr. Smith, as my counsel because he said it
25 was a -- excuse me, Your Honor. He said that it was a

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1 conflict of interest in the matter.

2 Mailed the letter off, Clerk of Court sent a copy of
3 the letter back also stating that she gave copy to my
4 attorney, Mr. Smith; the Solicitors Office; and to Judge
5 Early. Nothing was never heard back from that.

6 Q All right.

7 A And that ---

8 Q So ---

9 A --- is on file with the Clerk of Court.

10 Q So you continued with Mr. Smith?

11 A I had no choice. I spoke with -- I had called to the
12 Appellate -- excuse me -- I had called to the Public
13 Defender's Office and spoken with Mr. Gibbons. At least
14 the person said they was [sic] Mr. Gibbons. So I don't
15 know if it was him or not, but they informed me that
16 either I -- I was not getting another attorney. Either I
17 took Andy Smith, or I could damn well represent myself.

18 Q All right. Now, the -- in preparation of this case,
19 you were preparing the case for a plea or a trial?

20 A Trial. Every since this -- again, the first meeting,
21 Mr. Smith words after that telling me about the conflict
22 of interest, he says that, "We're going to plea." And I
23 let him know then that we're not pleading to nothing.

24 Q Why not?

25 A Why? 'Cause it's a crime that I did not commit. I

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1 plead my innocence from day one, and I plead my innocence
2 right now today even though that I was convicted of this
3 crime.

4 Q Now, what did you do? What did your attorney do as
5 far as preparing your case for trial?

6 A We met once -- several times -- a couple times on the
7 phone from the county jail we talked. When I made bond, I
8 would have my brother, whose passed -- he's -- he was a
9 paralegal. I would have him -- I would have him to come
10 with me so that I could understand terms and things that
11 the lawyers were talking with me. That's 'bout it that
12 was prepared for trial. I spoke to Mr. Smith about
13 witnesses --

14 Q Right.

15 A -- to -- who to go speak to about that. I also
16 explained to him about *The Jail Report* had posted on
17 Facebook a picture of me concerning the -- the crime, and
18 I had several people to comment and was stating that they
19 seen me at the time that this crime was allegedly
20 committed, that they seen me at the comedy show, and they
21 seen me at the after party. During, before, and -- during
22 and before the after party and ---

23 Q You had ---

24 A --- during the comedy show.

25 Q You had those -- those people actually showed up to

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1 testify.

2 A Three did, three did. He claimed that he couldn't
3 find the Facebook report I was telling him about with -
4 with -- with the people, witness -- or with the other
5 people that was verifying that they did see me. So he
6 never really got in touch with those other than the three:
7 Mr. Wright, Ms. Walker, and Ms. Williams.

8 Q Now, John, I know that in looking at your transcript
9 -- this is page 32 -- Mr. Smith basically opens and says
10 that that this is a case of identification.

11 A Yes, sir.

12 Q That this case revolves around identification.

13 A Yes, sir.

14 Q And why is that?

15 A Right here, Your Honor, it's where I have -- I says;
16 (as read): "Ineffective Assistance of Counsel. That
17 counsel failed to motion for *Neil v Biggers* hearing when
18 there was evidence at trial that the in-court
19 identification was based on law enforcement assistance
20 with out-of-court identification. This deficient -- this
21 -- his -- this deficient performance fell below
22 professional norms and led to a violation of Applicant's
23 due process right under State and Federal constitution.
24 Fifth and Fourteenth amendment. *State v Dino*, *Manson v*
25 *Birthright*, *Simpson v United States*, *State v Stewart*,

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1 Carver v Alabama and State v Washington. This prejudice
2 Applicant in that only -- in that the only witness against
3 Applicant is witness Jamisha Aliston. Her ---

4 Q All right.

5 A --- identification of the Applicant in the courtroom
6 swayed the minds of the jury."

7 Q All right.

8 A This girl baseded [sic] her whole identification upon
9 me of a lazy eye.

10 Q All right. John, we'll -- we'll get there. Let's
11 take it a step at a time, okay?

12 MR. THOMAS: Your Honor, and just for the Court's
13 information, on 32, it's lines 17 and 18.

14 Q Now, in preparing this case for -- for trial, what
15 was the theory of defense? Do you understand what I mean
16 about "theory of defense"?

17 A My alibi witnesses. That was it. That's all that I
18 had.

19 Q Okay.

20 A 'Cause I got -- that's -- that was where my
21 whereabouts were on the night that this crime was
22 committed, that Thanksgiving eve.

23 Q But you were not there.

24 A No, sir. I was not.

25 Q Okay. Now, did -- did you go over the discovery with

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1 your attorney?

2 A I went over the discovery. We didn't go over
3 anything ---

4 Q Okay.

5 A --- far as the discovery.

6 Q Did y'all talk about the cell phone information at
7 all?

8 A He -- on the day of -- three days I was at the county
9 jail, and he had me brought here to the courthouse and he
10 showed me some maps, pointed out different things, which
11 was, like, kinda Spanish towards -- to me. I did not
12 understand it ---

13 Q Yes.

14 A --- I looked at it. And then just showing different
15 geographical locations: Pie shapes, pins showing downtown
16 Aiken, Captain D's, things of that nature.

17 Q All right. Was he -- was he concerned about that
18 cell phone data?

19 A I really can't say he was concerned about it. I
20 remember him showing me and he was saying that these
21 particular towers that they show you pinging off of,
22 that's downtown Aiken. It was in the vicinity of down --
23 I don't know if you familiar with Aiken or not, but these
24 towers was in the vicinity of downtown Aiken.

25 One tower was Crosmpal, the other one was Shiloh

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1 Heights, and another one was -- I -- it's right there off
2 of 19. Those -- he show -- he was like, "Well, those are
3 showing that you was pinging off downtown," and that was
4 basically about it.

5 Q All right. And did he discuss with you, or did you
6 discuss with him, getting an expert to either advise him
7 or to testify in regards to that data?

8 A No, sir, none whatsoever.

9 Q Okay. And were you concerned about that, or did you
10 know enough to be concerned even one way or another?

11 A Well, yes, 'cause he was -- he was saying that the
12 State -- he was saying that the State was getting --
13 getting it looked at by a expert. And I was like, "What
14 about us getting a expert?" And he was like, "Well, we
15 don't need one."

16 Q Okay. Do you believe that today ---

17 A No ---

18 Q --- that you didn't need one?

19 A No, sir, I do not.

20 Q Okay.

21 A Didn't believe it during trial after the ATF agent
22 got on stand and testified the way she testified to. I
23 wish I had one then.

24 Q You think that helped to convict you?

25 A Yes, sir. The -- with the mapping and what she was

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1 explaining, which was scientifically unsound, as the
2 expert got up here today and said that -- that in itself
3 also I have for ineffective assistance of counsel (as
4 read): "For failing to investigate material facts around
5 the Applicant's cell phone in associating with the
6 vicinity of the crime. Counsel's failure to investigate
7 calls and to be ill prepared to properly cross-examine
8 State witness and object to inaccurate testimony. Had
9 Counsel investigated the cell phone towers or got a expert
10 to -- to -- for protocols, he would've been able to
11 properly dispel the inaccurate, scientifically unsound
12 testimony made by State witness or at the very least
13 properly objected and preserved Applicant's right to
14 appellate review. Also failing to object to inaccurate
15 testimony of fact."

16 And that prejudiced me in that the State witness's
17 scientifically unsound testimony at trial was used to
18 undermine my alibi. The Applicant was moving, and the
19 Applicant was not attending the comedy show and after
20 party at the time of this crime, Your Honor.

21 Q So -- so you're talking about a two prong, basically.
22 Not only that he didn't hire an expert, but he didn't hire
23 an expert to advise -- or get an expert to advise him
24 about what questions to ask.

25 A Not only to advise him, but again, I'm just a layman,

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1 Your Honor. I've been incarcerated since 2014. I spent a
2 couple a hours -- several hours inside the law library
3 trying to understand the law. It's the -- my
4 understanding, again, if I'm wrong, forgive me, that
5 something's not rebutted in law it's pretty much fact.
6 And when this man did not sit there and was able to rebut
7 anything that the ATF agent said, that became true. That
8 swayed them 12 people in that box that convicted me.

9 Q All right. John, let me ask you about -- you talked
10 a little bit about the identification, and there was a
11 witness, James Cheatham; is that right? Am I pronouncing
12 that correctly?

13 A Jameshia Alliston.

14 Q Jameshia. Okay.

15 (Brief pause.)

16 THE WITNESS: Can I have a ---

17 MR. THOMAS: Jameshia Alston.

18 THE WITNESS: Can I get one second.

19 THE COURT: Yes.

20 THE WITNESS: Thank you.

21 MR. THOMAS: Your Honor, may I approach?

22 THE COURT: Yes, sir. Assist you -- you can assist
23 your client.

24 (Brief pause.)

25 Q John, who is Jameshia?

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1 A She was a clerk/cashier.

2 Q She worked at Captain D's?

3 A Yes, sir.

4 Q And what kind of part did she play in this case?

5 A Her -- her identification weighed heavily 'cause
6 that's all that they had ---

7 Q All right.

8 A --- for this case was her identification and the cell
9 towers -- cell -- cell -- cell information.

10 Q Okay. And did she know you personally?

11 A No, sir. She did not.

12 Q So how did she find you or say that you were the guy?

13 A She went on Facebook.

14 Q Right. And William Keels, who is he?

15 A William Keels, I used to date his sister. He also
16 work on -- he also works at Captain D's.

17 MR. THOMAS: All right. Your Honor, this -- William
18 Keels is on page 65, lines 13 through 25.

19 Q So Keels was a -- was a co-worker?

20 A Yes, sir.

21 Q All right. And did she go through Keels somehow or
22 another to find you?

23 A If you'll go to the transcript ---

24 Q Well, just tell us, John, because I -- I think I've
25 got the pages that I can look for.

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1 A All right. Your Honor, she goes to William Keels'
2 Facebook page. I was in the restaurant on a Monday before
3 three -- two/three days before this happened. Came in, we
4 ordered some fish, and I used to date William Keels'
5 sister. Hadn't seen William since he was a teenager.
6 Long story short, he came out, we talked, we left the
7 restaurant.

8 She told -- according to transcripts, the record, and
9 also some of my motion she told investigators looked like
10 the guy that was up here talking with William Keels. She
11 went to William Keels Facebook page and she -- according
12 to her testimony, she saw my name and from my name, she
13 went to my picture. That's how she got two pictures of me
14 off of Mr. Keels' Facebook page.

15 Q All right. She said that -- I think she says that,
16 she saw your name.

17 A No. Actually, this is what she says. She says (as
18 read): "So ... and I remember his eye. Like, that's the
19 thing that caught me. His eye and his bald head." And
20 this is transcript page 58. He says (as read): "So ...
21 "Question: So you weren't aware of his name at the time
22 -- time of he incident?" "No, sir." "You did discover it
23 later, though, right?" "Yes, sir. I did. I went home
24 and looked it up."

25 She said she went home and looked up my name. That's

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1 on page -- that's -- that's line 5 through 9, on page 58.

2 And if you will go and look on -- if you will go to
3 transcript page 72, line 23, my lawyer asks her, says (as
4 read): "Okay. When you looked on Facebook,s that's where
5 you looked, right?" She said, "Yes, sir." "You scrolled
6 down through the pictures?" "Yes, sir. I did." "Or did
7 you type in John Upson's name?" She said, "No. I went on
8 William Keels' page and I found his name, and when I saw
9 his picture, I jumped up because I knew that was him."

10 Q Now, what page is that on the transcript?

11 A That's -- that's transcript page 73, lines 1 through
12 5. If you going on some -- Your Honor, if you going to
13 look for a individual, to ID them on Facebook -- I don't
14 know if you familiar with Facebook or not, but you looking
15 for -- you don't know my name, so you looking for my
16 picture. The record reflects that she said, "I went and
17 found his name, and then when I saw his picture ..." So
18 she went name hunting.

19 Lawyer goes down and he asks her, on line 22 -- I
20 like to go through the whole thing. Says (as read):
21 "Jumped up because I knew that was him, and then I clicked
22 on his name and I was scrolling through his pictures. As
23 I was looking, I jumped up again. I told my mom that was
24 him." "How many pictures do you think you looked at
25 before you found those?" She says, "Two pictures." She

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1 referring -- she's referring to the two pictures that she
2 submitted to law enforcement.

3 He says (as read): "Two?" She says, "Yes, sir. I
4 found those two." "How many pictures on William Keels'
5 Facebook did you look through?" "Oh, I just saw one
6 picture. It's like when you look on someone else's page,
7 it's only one profile picture." "Does he have a lot of
8 pictures of other people on his?" "I didn't look at
9 that."

10 So if you didn't look at that and you got to scroll
11 down through somebody pictures on Facebook, how could you
12 not look at nobody else's picture?

13 Q But John, let me ask you this. You know, you have
14 cited to the page of the transcript where you said that
15 she looked for ---

16 A My name.

17 Q --- John Upson, for your name.

18 A Yes, sir.

19 Q Now, in the transcript, is there any indication that
20 she was given some names to look at?

21 A Yes, sir, it was.

22 Q And where is that?

23 A Okay.

24 Q It's a couple of pages prior to where you are.

25 A I have -- I have it here. My lawyer asked Jameisha

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1 Alliston, on transcript page 75 (as read): "Jameisha, do
2 you know a guy named 'Ishmael NoridDeen'?" She says, "No,
3 sir." He said, "Were you ever shown a police -- he said,
4 "Were you ever shown a police line-up? Were you ever
5 shown a line-up of six people?" She said, "A list of
6 names." He said, "Well you -- you were shown names?"
7 "Yes, sir." "The police never showed you a line-up of
8 anybody?" She said, "Not people, like pictures. No,
9 sir." "Okay. No further questions."

10 Q So John, if it's your testimony that she went to
11 Facebook and found you from William Keels' -- Keels'
12 Facebook page --

13 A The investigate -- the investigator -- yes, sir. She
14 did.

15 Q Okay.

16 A Okay. According to -- according to the investigative
17 report, the investigator said that he went to talk to Mr.
18 Keels and asked Mr. Keels who was he up here talking to.
19 And he said that he had some names and he ---

20 MS. COLEMAN: Objection. This is all hearsay.

21 Q All right. Can't tell us what someone else said.

22 A Okay.

23 Q Okay. But is it your opinion that Ms. Jameisha
24 Allston had names that she was looking for on Facebook?

25 A Yes, sir. The record reflects that.

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1 Q Okay.

2 A Even her -- even her testimony reflects that.

3 Q And where would she have gotten those names to look
4 for?

5 A From law enforcement.

6 Q Okay. And this was an out-of-court identification?

7 A Yes, sir. During that time, it was.

8 Q All right. And was there ever any objection to her
9 making the identification on Facebook?

10 A No, sir.

11 Q All right. Was there ever any motion to suppress the
12 out-of-court identification as a result of either
13 suggestiveness from law enforcement or the actual process
14 of discovering you on Facebook?

15 A No, sir, it was not.

16 Q And do you believe that Counsel should've done that?

17 A Yes, sir. I do believe he should've done that. Your
18 Honor, 'cause it had -- had he done that, objected to
19 that, once he found out that it was unduly suggestive
20 police procedure by getting those lists of names showed
21 involvement of law enforcement and this young lady going
22 to Facebook when she testified and said, "I went and
23 looked for his name of the person I was looking for", that
24 I would never been -- that -- that the *Neil v Biggers*
25 factor would've had come into play.

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1 And out of those five factors of *Neil v Biggers*, the
2 prior opportunity of the witness to observe the criminal,
3 she had an obscured view. She said these people came in
4 this restaurant with hoods and bandanas on. She testified
5 that -- if I -- if you go to trial -- trial transcript
6 page -- trial transcript page 77, line 14, Mr. Slocolm, I
7 believe it is, says (as read): "Real quick. You
8 mentioned telling law enforcement -- Mr. Smith asked you
9 about the eyes. What was it about Mr. Upson's eyes that
10 you remember?" "He has a lazy eye. It's kinda droopy,
11 like that."

12 Also, one of the factors is the Defendant is --
13 excuse me, is the victims be able to give a description of
14 this person. She rested her whole identification, Your
15 Honor, that I have a lazy eye. That's something that I do
16 not have.

17 Further testimony by witness Scott Hall on direct,
18 they asked Scott -- they asked Scott Hall about the people
19 that robbed the place. Scott Hall said that the people
20 that came in was 5'11 and taller than that. I don't have
21 those transcript pages handy, sir, but it's the testimony
22 of Scott Hall. He said that the people was 5'11" or
23 taller than that.

24 But back to the *Neil v Bigger* factor, it's ---

25 Q That's one -- I'm sorry, John.

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1 That's page 130, lines 11 through 12, Your Honor.

2 Go ahead, go ahead, John.

3 A And it's one that's -- the fact -- this is the prior
4 opportunity of the witness to be able to observe the
5 alleged criminal act, the existence of any discrepancies
6 between any prior line-up description and the Defendant's
7 actual description, any identification prior to the line-
8 up of another person, failure to identify the Defendant on
9 prior occasions, and the lapse of time between the alleged
10 act and the line-up. Had -- he's a -- had he asked for a
11 *Biggers* hearing, again, I'm just a layman, but I got
12 common sense. All five of those factors wasn't met.

13 This woman's description of me alone, of a lazy eye,
14 that's something I do not have, Your Honor. That's what
15 she based her whole description on throughout her
16 testimony (as read): "He has a lazy eye. It kinda droop.
17 That's the thing that caught my eye. His bald head and
18 his lazy eye." The two pictures that she showed didn't
19 even depict that.

20 Q John ---

21 A Yes, sir.

22 Q --- let me ask you while you're talking about that,
23 if you'll look again at page 77 that you were quoting and
24 beginning on line 19 through 23, it appears that there is
25 testimony on 15 through 17 of that page about the lazy

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1 eye.

2 A Yes, sir.

3 Q Okay.

4 A Fourteen. That's why I was testifying to the judge.

5 Q 14 through 17 about the lazy eye. Now, the Court
6 asked Mr. Smith on line 22 (as read): "Anything on re-
7 cross?"

8 A He said -- he said (as read): "No, Your Honor."

9 I mean, even his -- in his question alone shows how
10 he was ineffective. Once -- once she was -- she told him
11 that she was shown a list of names, he said, "No further
12 questions." He didn't even bother to go any further with
13 that.

14 Q Did he ask about anything about the lazy eye?

15 A Only thing he asked about her was about her prior
16 statement, and that was in --

17 Q Page 61.

18 (Brief pause.)

19 A You said "61"?

20 Q I think it's 61, 4 through 8.

21 A It's 67.

22 Q 67. Okay.

23 A 67 lines -- lines 9, he says (as read): "Did you
24 talk about any facial hair?" She says, "No, sir."

25 Twelve, he asked her, "Eyes?" She says, "Yes, sir."

DIRECT EXAMINATION BY MR. THOMAS - JOHN LYNDON UPSON

1 So she said that -- also, her testimony she said that
2 she told law enforcement that, amongst other things. So
3 she also told law enforcement that she knew it was me
4 because of a lazy eye.

5 Again, she had an obscure view of people with hoods
6 and bandanas on. She gives more account -- detail account
7 about a pistol that was involved in this crime. But
8 again, she based her whole identification of me on a lazy
9 eye and that's not part of my description, Your Honor.

10 And had he asked for the *Neil v Biggers* hearing, that
11 would've came out, and those five factors wouldn't have
12 been met to prove the reliability of her identification
13 against me. She had a obscured view, the detail that she
14 put for my eye that's not part of my description. And
15 then, by her going on Facebook and getting names from law
16 enforcement.

17 Q John, was there any objection about -- if you take
18 the suggestiveness out in regards to her being given the
19 names potentially, was there any objection to the use of
20 Facebook as an identification process at all?

21 A No, sir, it was not.

22 Q Okay. And was she ever shown a photo line-up?

23 A According to her testimony, she said she wasn't.

24 Q Okay. And was a photo line-up presented at court?

25 A Sir?

DIRECT EXAMINATION BY MR. THOMAS - JOHN LYNDON UPSON

1 Q Was a -- was a photo line-up presented at court? Did
2 they have a picture of one?

3 A Not to my recollection. No, sir.

4 Q Okay. So to the best of your knowledge, there was no
5 other identification other than her out-of-court
6 identification on Facebook?

7 A Yeah. When she sat on the stand and pointed to me.

8 Q Okay. All right. John, I know that you've been very
9 active in preparing this case --

10 A Yes, sir.

11 Q -- the whole presentation today. You've been
12 waiting. I'm not suggesting anything by this, but I
13 wanted to -- to ask you is there anything else that you
14 would like to present to the Court, anything else that you
15 feel that's of importance that I might have overlooked?

16 A Yes, sir, there is. And again, I know you know the
17 law, Your Honor, 'cause you wouldn't be a judge if you
18 didn't.

19 In *State v Tisdale*, it's a bank robbery. Unlike in
20 *Tisdale's* case, in my case there was law enforcements
21 [sic] with the suggestiveness. Also in *Tisdale*, the bank
22 tellers gave -- they said he had a distinctive chin
23 structure. That was something that they reported to
24 police, that that also lined up with his description.

25 Her whole description was based off a lazy eye.

DIRECT EXAMINATION BY MR. THOMAS - JOHN LYNDON UPSON

1 That's all she kept talking about is that she knew it was
2 me because of a lazy eye. Solicitor came back and asked
3 her, "What was it about Mr. Upson's eye?" "Oh, he has a
4 lazy eye, it droops."

5 Your Honor, you're lookin' me dead in my face. Do I
6 have a lazy eye?

7 THE COURT: (No response.)

8 THE WITNESS: This is what I'm saying. But had he
9 done that, had he asked for the *Biggers* hearing when the
10 suggestiveness came up and further questioned her about
11 that or objected to the in-court identification, which
12 prejudiced me 'cause that swayed the mind of the jury.
13 But had he objected to that -- to that unduly suggestive
14 suggestiveness by police law enforcement, that we would've
15 had to had that *Biggers* hearing and I don't believe I'd be
16 sitting here today.

17 Q John, is there anything else?

18 A Not that I can think of at this time. No, sir.

19 Q Okay. All right.

20 MR. THOMAS: Your Honor, I have no further questions.

21 THE COURT: Ms. Coleman?

22 MS. COLEMAN: I have no questions of this witness.
23 Thank you.

24 THE COURT: Okay. Thank you, Mr. Upson. You can
25 step down.

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1 THE APPLICANT: Thank you, sir.

2 (The Applicant exits the stand.)

3 MR. THOMAS: Your Honor, if it please the Court.
4 that's the Applicant's case.

5 THE COURT: Okay. Thank you, Mr. Thomas.

6 MR. THOMAS: Yes, sir. Thank you.

7 MS. COLEMAN: State calls Public Defender Grant
8 Gibbons.

9 GRANT GIBBONS, having been first
10 duly sworn, testifies as follows:

11 THE WITNESS: My full name is Dee, D-e; my middle
12 name is Grant; last name Gibbons, G-i-b-b-o-n-s.

13 DIRECT EXAMINATION

14 BY MS. COLEMAN:

15 Q Hi, Mr. Gibbons. Where are you currently employed?

16 A I am the Circuit Defender here in the Second Circuit.

17 Q How long have you been practicing law?

18 A Since 1991.

19 Q How were you involved in the representation of Mr.
20 Upson?

21 A In my office we are split into teams, and I have one
22 attorney on my team and I was his supervising attorney. I
23 was the -- I took second chair in this case.

24 Q Okay. And is Mr. Smith currently employed with the
25 office?

1 A He is not. He's currently a member of the Bar in
2 Colorado and has moved on.

3 Q Okay. How much involvement do you have -- did you
4 have in the preparation of this case?

5 A They would come to me with small questions here or
6 there throughout the case. There was a investigator that
7 worked pretty -- Robert Anderson, that worked pretty
8 steadily on the case with Mr. Smith; and then when it go
9 time for trial, I -- I did sit in on the prep.

10 Q Did you ever meet with Mr. Upson?

11 A I think we -- we met maybe day before trial, day of
12 trial. I'm not sure. It's been a long time.

13 Q All right. Were you aware of the defense strategy --
14 or trial strategy that Mr. Smith was planning to take and
15 took in this case?

16 A Yes, I was.

17 Q How would you describe that defense?

18 A It was an alibi case.

19 Q Okay. What kind of an alibi was Mr. Upson
20 suggesting?

21 A Mr. Upson indicated that he had been at a comedy club
22 event for the whole -- whole period of time that the crime
23 was committed.

24 Q Did you have any alibi witnesses that would account
25 for his presence at the comedy club the entire evening?

1 A We did have the three witnesses. I saw in the notes
2 where the investigator had been trying to find a few other
3 folks and had not found them, but we did have some
4 witnesses. I don't recall that anybody could say they sat
5 right next to Mr. Upson and had eyes on him the whole
6 night, but they had seen him at different points during
7 the evening.

8 Q Okay. Did the testimony presented by the State and
9 by the alibi witnesses leave the opportunity for the
10 Applicant to have left the comedy club at any point?

11 A Well, like I said, we couldn't -- nobody said they
12 saw him every minute of the whole time.

13 Q Uh-huh.

14 A And there's no way to -- to account for every minute.
15 And the State's theory was that even if he was there, he
16 had time to have left and come back or -- or left early or
17 something like that; and -- and that was just going to be
18 a jury issue.

19 Q Okay. In your opinion, was this a good alibi or had
20 you seen better or worse in other cases?

21 A I've seen a whole lot worse. It wasn't a bad alibi.

22 Q Okay. What's your recollection of -- (clears throat)
23 excuse me -- of the cell phone records and data that was
24 presented by the State at trial?

25 A I remember that they had come to me several times

1 getting ready for the case in the months before, and they
2 were having to continuously remind or request records from
3 the State. The State said they didn't have them yet.
4 They were being looked at by this agency, that agency.

5 As I recall, we didn't know the ATF was involved in
6 the records until I want to say a couple days before court
7 if that early. But we did have the charts that they had,
8 and we did have the raw data.

9 We had a -- a phone -- a heavy phone record case a
10 short time before this happened, and there was another
11 attorney in the office that was -- was pretty savvy about
12 how those reports were used by law enforcement and we did
13 meet with him and go over the reports.

14 Q Was there ever any discussion about your requesting a
15 continuance to consult with an expert on this cell phone
16 data?

17 A I don't recall if we did that or not. Our biggest
18 thing we were worried about was not them using the reports
19 to show that Mr. Upson was at the incident location. Our
20 biggest worry was since we were trying for an alibi
21 defense, any phone record that showed him away from the
22 comedy club area would've been the biggest thing we were
23 worried about 'cause ---

24 Q Uh-huh. Did ---

25 A --- you can call -- they can call Captain D's from,

1 you know, Guam if they wanted to, but what we were
2 concerned about is the phone they attributed to Mr. Upson
3 being away from the comedy club that night.

4 Q Did any of the State's evidence show that he was away
5 from the comedy club to your recollection?

6 A I don't recall.

7 Q Okay. Did the cell phone data include evidence of
8 Mr. Upson's phone receiving calls from and placing calls
9 to the Captain D's that night?

10 A I don't recall exactly what the record said. I know
11 Mr. Upson told us that he had called there earlier that
12 night.

13 Q Okay. What was his explanation for that?

14 A I think he knew somebody that worked there, an old
15 friend, and he just wanted to talk to him.

16 Q Okay. And was this during the time or -- or around
17 the time of the crime?

18 A I -- I don't recall.

19 Q Okay.

20 A Sorry.

21 Q Okay. The witness, Jameisha, who identified the
22 Applicant as the person who had kidnaped her, how would
23 you describe her identification?

24 A It's -- well, it was -- it was kind of a strange
25 situation. As I recall it -- and of course it's been a

1 long time and I didn't know about this hearing today, as I
2 recall what happened she independently, on her own,
3 thought she had seen the person that robbed the store
4 before come in earlier with another gentlemen. So she did
5 her own little investigation on Facebook looking for that
6 person; and then once she found the picture, looking for
7 that name.

8 So it was kind of a strange situation. All the
9 identification was done prior to her calling law
10 enforcement is what I recollect.

11 Q Uh-huh.

12 A That she did an independent investigation, and once
13 she had her -- already made up her mind who it was, then
14 she called law enforcement.

15 Q Okay. Do you have any recollection of a list of
16 names being given by law enforcement to this witness?

17 A No, I don't.

18 Q Okay.

19 A I -- I -- I seem to recall that she was looking for a
20 picture so she could hook a name to it is what I recall
21 her saying, but you know, things can be -- come out
22 different ways in a transcript. So ...

23 Q So that was the -- the -- the gist of her testimony
24 that you recall from the trial?

25 A Yes, ma'am.

1 Q Okay. Do you have any recollection of any kind of
2 overly suggestive government interference with her
3 identification of the witness?

4 A Well, my -- my thoughts of the matter was that the
5 identification all took place before she called law
6 enforcement is what my understanding was. She had a name
7 and a picture before she even talked to them --

8 Q Uh-huh. Do you recall ---

9 A --- as I recall.

10 Q --- what trial counsel's closing argument was to the
11 jury?

12 A Defense counsel?

13 Q Yeah.

14 A He did a demonstration where he had taken some
15 celebrities and covered up their face except for their
16 eyes, and -- and was showing the jury how hard it is to
17 identify somebody just from their eyes.

18 Q Uh-huh.

19 A And I thought it was really effective. And that was
20 his -- his method of attacking the -- the eyewitness
21 identification of Mr. Upson.

22 Q Do you recall what other evidence the State presented
23 if any? I can see Mr. Upson -- and I know it's been a
24 long time.

25 A It's been a long time. I know they had the phone

1 records, which I -- I didn't think -- I thought they got
2 so technical that nobody knew exactly what they were
3 trying to say.

4 Q Uh-huh.

5 A Then they -- they had the eyewitness folks, and then
6 they focused on the fact that no -- that nobody had eyes
7 on Mr. Upson the whole time at the club and he would've
8 had a window to rush across town and rush back.

9 And Mr. Smith, I thought effectively, tried to deal
10 with that in the closing remarks, too, that it would've
11 been really strange for someone to run off to the -- do
12 this crime, come back, and then console a friend at the
13 comedy club that was having a hard time. He -- and he
14 made an argument how inconsistent that would seem to be.

15 Q How would you characterize the State's evidence in
16 this case, was it a strong case?

17 A It's one of those that's right in the middle that
18 ends up going to trial. Not the strongest case, not the -
19 - not the weakest case.

20 Q No further questions. Thank you.

21 THE COURT: Mr. Thomas?

22 MR. THOMAS: Your Honor, if it please the Court.

23 CROSS-EXAMINATION

24 BY MR. THOMAS:

25 Q Mr. Gibbons, good to see you.

1 A Good to see you too, sir.

2 Q Haven't seen you in a number of years.

3 Just a couple of questions, if I may. Your
4 involvement, you said you were second chair and you were --
5 -- could answer some of the questions that they had.

6 A Procedural stuff. Yes, sir.

7 Q Procedural stuff. Yes, sir.

8 A Uh-huh.

9 Q So you weren't really involved in -- in the -- the
10 heavy lifting, I guess, in ---

11 A No, sir.

12 Q --- this case? Okay. Now, you had stated that this
13 was an alibi defense?

14 A Yes, sir.

15 Q And so the identification of the Defendant would've
16 been important --

17 A Yes, sir.

18 Q -- from of the State's standpoint?

19 A Yes, sir.

20 Q Okay. And also, if it was an alibi case and the
21 identification was a significant issue, the cell phone
22 data would've played a important part in this case as
23 well.

24 A Well, if -- if it would've been meaningful.

25 Q Okay.

1 A If it would've shown him at the scene ---

2 Q Is it fair ---

3 A --- it would've.

4 Q --- to say the State was using this evidence, cell
5 phone evidence, to try to show that he could've committed
6 this crime?

7 A I think they were trying to show he was away from the
8 club during the night sometime when he said he was there
9 the whole night. I ---

10 Q All right. And ---

11 A --- think was ---

12 Q And ---

13 A --- that was the ---

14 Q --- in essence, had been at the Captain -- well, the
15 next step would've been if he was away, he would've been
16 at Captain D's and been able to commit ---

17 A I think they wanted to -- to make -- leave that
18 assertion. I don't think they ever went as far as to
19 claim that that I recall.

20 Q Okay. And now you said that you were getting the
21 cell phone data in kind of sporadically and got it even
22 actually right up to trial?

23 A Not saying the data.

24 Q Okay.

25 A They didn't tell us who they were going to use to

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1 testify at trial until right before trial. We had no idea
2 ATF -- ATF was coming in until the very last minute.

3 Q That makes me ask -- ask the question: Was there a
4 discovery problem?

5 A Well, we had the data --

6 Q Right.

7 A -- and that's what they were going to use. We
8 claimed that we should've been able to have a chance to
9 interview or -- or work with the guy who was going to
10 interpret the data before -- before trial, but I don't
11 think the judge was going to go along with that or -- or
12 that ended up happening.

13 Q Do you ---

14 A We had that data, we just didn't know what they were
15 doing with ATF.

16 Q Right. Then do you know if a motion was made prior -
17 -

18 A I do not.

19 Q -- to trial to -- for a continuance or for the actual
20 production of that information?

21 A I don't recall it, sir. I'm sorry.

22 Q Okay.

23 A I don't have the file in front of me.

24 Q Do you think that there was a potential *Brady*
25 violation in essence of them not providing you that

1 information prior to trial?

2 A Well, it's hard to say. I don't know what -- I don't
3 know that the -- there was anything exculpatory in it or
4 not 'cause I didn't --

5 Q Yes, sir.

6 A -- we didn't have access to it until he got up on
7 the stand.

8 Q Do you know whether or not there were any written
9 statements by ATF or by anybody that had looked at that in
10 regards to what their conclusions and -- to the cell phone
11 data was?

12 A I think the answer we got was, "There was no report
13 made," which is what we get when the ---

14 Q Yeah.

15 A --- there have been conversations, but they didn't
16 make a report.

17 Q Didn't make a report. Okay.

18 Now, when I read the transcript and I talked to Mr.
19 Upson, the thing that jumped out at me -- which I thought
20 was odd and I'm not sure that I know the answer to -- is
21 this thing about a Facebook identification, how someone
22 can kind of go outside of the system, use Facebook on
23 their own investigative process, and make an
24 identification that way. Do you think there was anything
25 objectionable in that?

1 A Well, we talked about that, and -- and most of the
2 objections that I've made to identifications have been law
3 enforcement was guiding them, law enforcement was setting
4 it up, law enforcement was doing it incorrectly. And as I
5 recall it, she'd already done it all before she even
6 called law enforcement, and so I didn't know there was any
7 State action we could object to. But you know, I'm -- I'm
8 going off of recollection.

9 Q But -- but it is correct to say that there was no
10 pretrial motion made to try to prevent any of this
11 identification from coming in?

12 A I wasn't sure exactly what motion to make to have
13 someone that relied on themselves to make the
14 identification.

15 Q Yes, sir.

16 A I don't -- I'm not sure of that motion.

17 Q And I -- and I know hindsight's always 20/20, but --

18 A Yeah.

19 MR. THOMAS: May I approach, Your Honor?

20 THE COURT: Yes, sir. Sure.

21 MR. THOMAS: Okay.

22 Q And I'm going to show you ---

23 (Brief pause.)

24 Q Mr. Gibbons, I want to show you -- and I apologize,
25 my -- my transcript was numbered a little differently --

1 page 73, lines 20 through 25; and 75, basically lines 20
2 through 25. If you would just look at that ---
3

4 A Okay.

5 Q --- look at that, please.

6 (Brief pause.)

7 A Okay.

8 Q All right. And that's the -- the identification
9 witness, the Jameshia ---

10 A Right.

11 Q --- testifying.

12 A Right.

13 Q Doesn't that ---

14 (Brief pause.)

15 MR. THOMAS: Your Honor, if it would please the
16 Court?

17 (Brief pause.)

18 THE COURT: Yes, sir.

19 MR. THOMAS: Yes, Your Honor.

20 Q Mr. Gibbons, in reading those two pages --

21 A Yes, sir.

22 Q -- doesn't it appear to say, one, that she had a name
23 that she was looking for on Facebook?

24 A All right. Here's what I see that you show me. She
25 was on his -- his Facebook, she looked at pictures and

1 found the pictures. And then, if you look on page 74 says
2 (as read): "Then she scrolled down a friend list and
3 clicked on his name."

4 Q All right.

5 A And there was ---

6 Q So ---

7 A --- and so she's talking about a list on Facebook is
8 what I'm seeing.

9 Q Okay. But then, if you go to the next page, they
10 asked her about the photo line-up, and they asked her if
11 she was shown a photo line-up. It appears that she says,
12 "No."

13 A Right.

14 Q And she says a list of names.

15 A Right. That's talking about (as read): "Jameshia,
16 do you know a guy named 'Norid Deen'?" "No." "Were you
17 shown a line-up?" "No. Was I -- shown a list of names."

18 Q All right.

19 A Right.

20 Q Couldn't that have been used in a pretrial motion --
21 couldn't that have been used in a pretrial motion to try
22 to suppress the identification?

23 A Well, that's a -- that's talking about Mr. Norid
24 Deen. Everything I see here, she got pictures, she went
25 to the friend list, and picked Mr. Upson's name off the

1 friend list and ---

2 Q Right.

3 A --- then called law enforcement.

4 Q Okay.

5 A And then that's when Norid Deen came in with the list
6 the cops gave her is -- is what I remember.

7 THE COURT REPORTER: Norid Deen?

8 THE WITNESS: Want me to spell it? Ishmael Norid
9 Deen. N-o-r-i-d D-e-e-n is how they spelled it in the
10 transcript.

11 THE COURT REPORTER: And Ishmael's spelled how?

12 THE WITNESS: I-s-h-m-a-e-l.

13 THE COURT REPORTER: Thank you.

14 A That's what I recall.

15 Q Okay. All right. But wouldn't that be inconsistent
16 with the position that she, on her own, went to Facebook
17 and looked at pictures only and found Mr. Upson through
18 pictures?

19 A What I read just there was she went and found the
20 picture and then scrolled down to a list of names is what
21 it says --

22 Q Right.

23 A -- and found Upson's name is what -- what I just
24 read.

25 Q Okay. But -- but my -- my problem with it is -- and

1 maybe I'm wrong, but my problem with it is that she had a
2 name. She doesn't say she found a picture and then found
3 the name. She basically says she scrolled down through a
4 list of names --

5 A A friend list.

6 Q -- friend list, and then found a picture. Based ---

7 A I think it's backwards.

8 Q --- upon finding that name.

9 A I think you said -- I think you said that backwards
10 from what the transcript said.

11 MR. THOMAS: And I apologize, Your Honor.

12 Q Well, it says at 22 (as read): "No, sir. I just
13 looked at his name who I was looking for." And then the
14 question (as read): "You were looking for John Upson?"
15 And she says, "Yes."

16 A But before that she's looking at pictures I think.

17 Q Okay.

18 A Maybe I -- can I look at it again?

19 Q Sure. Yeah.

20 THE COURT: Counsel, I -- I'm going to read the
21 transcript.

22 MR. THOMAS: Okay. That's fine.

23 THE WITNESS: Okay.

24 THE COURT: I'm going to read the -- the transcript
25 will speak for itself.

1 MR. THOMAS: Okay. Thank you, Your Honor. I have no
2 further questions, Your Honor.

3 THE COURT: Okay. Anything?

4 MS. COLEMAN: Nothing further.

5 THE COURT: All right. Thank you sir.

6 THE WITNESS: Thank you, Your Honor.

7 THE COURT: You can step down.

8 THE WITNESS: Your Honor, can I -- can I put
9 something on the record about the conflict of interest?
10 Just for ...

11 THE COURT: Yes, sir. I'll allow you to do it.

12 THE WITNESS: Is that all right?

13 MR. THOMAS: I -- I have no objection.

14 THE COURT: Okay.

15 THE WITNESS: Mr. Smith was trying to be funny and
16 lighten the mood and said the thing about, "Well, we may
17 have a conflict of interest 'cause I like to eat at
18 Captain D's." I told him that was not the right thing to
19 say and I know that a lot got made of that, but for the
20 record, that's -- it was a joke.

21 THE COURT: Noted for the record.

22 THE WITNESS: Thank you.

23 (The witness exits the stand.)

24 MS. COLEMAN: Thank you, Mr. Gibbons. And the State
25 has no further witnesses, although we would request a -- a

1 brief closing argument, if Your Honor will allow.

2 THE COURT: All right. I'll -- I'll hear from you
3 first, Ms. Coleman, then I'll turn it over to Mr. Thomas
4 since he's the moving party.

5 MR. THOMAS: Your Honor --

6 THE COURT: Well, let -- hold on. Let me hear from
7 you ---

8 MR. THOMAS: I -- I was actually going to say, Your
9 Honor, I don't necessarily have a closing.

10 THE COURT: Okay.

11 MR. THOMAS: We're not in front of a jury ---

12 THE COURT: I was going to give you last argument, so
13 ...

14 MR. THOMAS: Okay. All right. I'll take it then.

15 THE COURT: All right.

16 MR. THOMAS: Thank you.

17 THE COURT: Okay.

18 MS. COLEMAN: Thank you, Your Honor. And this will
19 be brief. Just looking at the issues that the applicant
20 has raised, his first issue, the -- the identification, I
21 guess, and the *Neil v Biggers* hearing, my argument is
22 there is -- there's no motion he could've made. This is
23 not improper -- there's no improper, overly-suggestive
24 photo line-up, or anything by the government on this part
25 as Mr. Gibbons testified and I -- as the record shows.

1 She did the research on her own. She recognized this
2 man from -- and -- and he admitted today on the stand he
3 had been in the Captain D's a few days earlier. He had
4 visited with a friend, he had placed an order, and she
5 remembered him and then she went back after the robbery.

6 She went back that night, went on Facebook herself,
7 and looked up a picture of the man who was friends with
8 her co-worker; and she recognized him as the man that had
9 been there a few days earlier, and as the man that had
10 been part of the robbery that evening. She recognized a
11 picture, she saw his name, and she sent it on her own to
12 law enforcement.

13 The government -- there's no proof today that law
14 enforcement provided her with anything. The testimony
15 about the list of names that she received, their
16 accusation today is just speculation based on this
17 testimony from the trial transcript. We have no real
18 evidence that law enforcement gave her a list of names and
19 told her to look for the person who did it. All that the
20 testimony shows that she looked him up on her own and sent
21 the pictures of the man she recognized as the guy who --
22 who held her hostage to law enforcement.

23 THE COURT: So you -- you're interpreting page 75
24 where it says (as read): "Were you shown -- were you ever
25 shown a police line-up? Were you shown a line-up of six

1 people?" And she says (as read): "A list of names."

2 "You were shown names?" She said, "Yes, sir."

3 So what -- how -- how are you interpreting that?

4 MS. COLEMAN: Now, that -- and -- and I don't dispute
5 that, of course. That is her testimony, but we don't know
6 when that -- when she was shown a list of names. You
7 know, if they -- and -- and obviously they didn't show her
8 a line-up, and they may well have shown her a list of
9 names afterwards; but her testimony shows that she
10 immediately went home, she didn't mention a list of names
11 at the beginning. She went home, she looked on Facebook,
12 and she found a picture of the guy that she recognized as
13 the -- the kidnapper, and she sent it to law enforcement.

14 The cell phone expert that we presented today, first
15 of all, I don't believe that trial counsel was deficient
16 for failing to consult with a cell phone expert because he
17 said he -- they had the -- the data all along. They --
18 there was some question about how the State was going to
19 present it and who they could -- who was going to present
20 it at trial at the very last minute there.

21 I don't think it was unreasonable for him not to
22 consult with his own expert, especially in a case where
23 the State was not using the dat -- the data to show that
24 he was at the Captain D's at this time and -- and he's the
25 one who did it. Mr. Gibbons -- and -- and the transcript

1 shows that the State was really just presenting it to show
2 that he wasn't at the comedy club, he could've been
3 elsewhere, which does not match up with his alibi.

4 The evidence also -- also showed that he had made
5 phone calls to Captain D's, and there were phone calls
6 from Captain D's to his phone -- or whoever had his phone
7 -- immediately before the robbery. I don't think a cell
8 phone expert of his own could contradict that evidence,
9 regardless of what tower it was bouncing off of.

10 And I would also argue that his trial counsel's
11 closing argument properly addressed the identification
12 issue. He -- he cross-examined and impeached each of
13 these witnesses, and his entire closing argument was
14 trying to attack the -- the reliability of the
15 identification by arguing that this -- he was wearing a
16 hood and a bandana, half of his face was covered, and it's
17 really difficult to identify someone when you can only see
18 their eyes and part of the nose. I believe that was a --
19 an adequate attack on the identification there, along with
20 his cross-examination of the witness who identified him.

21 So overall, I don't believe there was any deficiency
22 by trial counsel on any part, but there's especially no
23 prejudice based on the identification of the witness who
24 was absolutely certain, per her own investigation, that
25 this was the man who kidnaped her, as well as the cell

1 phone records showing his calls to Captain D's from his
2 cell phone immediately before the robbery.

3 I think this is a close case. I don't think it's
4 overwhelming evidence case, but I think it's a situation
5 where they went to trial, the jury was presented with both
6 sides, and they made their decision based on the evidence.
7 So thank you.

8 THE COURT: Thank you, Ms. Coleman.

9 All right. Mr. Thomas, give you the last word.

10 MR. THOMAS: Your Honor, if it please the Court. I
11 think that this -- this is an important case of
12 identification. I mean, without the one lady who was
13 working there, Mr. Upson wouldn't be sitting here today.
14 So I think the issues of identification are paramount in
15 this case. And I think the phone records are -- also fall
16 directly behind her identification because the cell phone
17 records were also used as an identification method to say,
18 you know, Mr. Upson was -- was there or close by or
19 could've been there.

20 The testimony is that these guys come in and they're
21 wearing bandanas. All they could see -- and they're
22 wearing hoods, from what I remember. So all they can see
23 are their eyes, and she's saying that, "I saw him because
24 of the lazy eye."

25 Well, Counsel was sitting right there with Mr. Upson,

1 and if you look at the transcript, he doesn't ask her
2 anything about it. He says, "I have nothing further."

3 So if that was -- a key issue of identification was a
4 lazy eye, "That's why I know it's him because of the lazy
5 eye," why not ask her a question about it? "You see Mr.
6 Upson sitting right here? Show me the lazy eye." I -- I
7 think that's extremely prejudicial.

8 And then you go to the fact of the Facebook. And
9 technology's amazing. It just -- it moves faster than we
10 can keep up with in the law sometime. When I read it,
11 something struck me. I just think it's something weird
12 about a witness going online and searching out Facebook to
13 find the potential perpetrator of a crime.

14 Now, she does that based solely on the fact that --
15 well, from what she says, from the fact that he has --
16 there's a co-defendant there.

17 All right. I don't know how she places that Mr.
18 Upson and that co-defendant are friends. How does she --
19 and there's nothing in -- in the transcript that really
20 leads you there other than she says, "Well, he's a friend
21 of this..." -- well, not co-defendant, but "this co-
22 worker." So she goes from there and goes to facebook.

23 And I think that if you look at the transcript, it
24 says, "I was looking for a name." Well, if you don't know
25 who he is, how are you looking for a name? And then the

1 second part of it is, "Well, no, I never was shown a photo
2 line-up, but I was given a list of names." Well, if it's
3 unclear about Norid Deen, the way I read it it doesn't
4 appear to me that they're talking about Norid Deen, that
5 they're talking about John Upson.

6 Now, should he had filed -- done a pretrial motion to
7 suppress the identification? I think you could have on
8 the - on the Facebook issue. Now, it's a new technology.
9 Is there any case law that would support that? Maybe not.
10 But I think it's at least an issue that it should've been
11 brought to the Court's attention.

12 THE COURT: How -- how do you address the State's
13 contention that the identification was -- of the photo was
14 made entirely on the witness's own before going to law
15 enforcement? How do you address that argument?

16 MR. THOMAS: Well, I think that -- well, I think that
17 is that -- and I concede that's a problem. If you just
18 say that the witness did nothing but go on her own and
19 made the determination pre -- you know, to -- to address
20 that pretrial, but I think that information didn't come
21 out until trial.

22 So is it then that you make a motion to -- to object
23 to the identification or at that point in time, can you
24 suppress that identification? Because that that point in
25 time, the Defense knew. She said that there was a list of

1 names, and she said that, "I was looking for a name." So
2 at that point in time, maybe it takes it out of the realm
3 of just saying, "Well, the witness went to Facebook and
4 identified this potential perpetrator of the crime on her
5 own," to where you then have a situation where now you're
6 saying, "Well, maybe there was some suggestiveness of law
7 enforcement."

8 So maybe it's -- you can't be -- predict the future,
9 so it would've been more difficult to have made that
10 objection pretrial. Although it -- I don't think -- I
11 would've still made an objection about the Facebook
12 identification. Might've lost it, but I would've at least
13 preserved it for the record.

14 But then, I think, clearly when this issue comes up,
15 they should've objected to it and they didn't. And it
16 goes straight to -- in -- but it all fits in. You know,
17 you talk about the misidentification of the lazy eye,
18 which not -- was not objected to it -- falls right into,
19 "Well, I went on Facebook. I was looking for a name."
20 Maybe there was -- she was -- some suggestiveness of these
21 names.

22 And then, the kind of -- the third peg in that, which
23 nobody seems to think is that important, are the cell
24 phone [sic]. Now, I read the transcript. I'm not a cell
25 phone expert, that's why we got Mr. Slovenski to come in

1 here. When I read it, my first impression of reading it
2 was that -- that was -- you know, this is damaging. This
3 cell phone data shows, to me, that Mr. Upson was at
4 Captain D's. And a common sense approach to that is why
5 would you -- why wouldn't the State use it? They're not
6 using it to say Mr. Upson was talking on the phone. And
7 -- and my memory may serve me wrong, I don't remember
8 there being a cell phone call to Captain D's immediately
9 prior to this robbery. I -- and I may have missed that,
10 but I just don't remember that.

11 And so the State was using that to show, one, that he
12 was either at Captain D's or he was near Captain D's. And
13 if you look at those original maps with those pie shapes,
14 low and behold, Captain D's is in -- within one of the
15 pies.

16 So I think that Counsel was extremely deficient in
17 not obtaining -- if they didn't obtain an expert, why
18 didn't they get somebody to look at it so they could ask
19 the appropriate questions from the testimony of ATF?

20 And ATF is impressive. I mean, you got somebody from
21 Alcohol, Tobacco, and Firearms from a federal agency who's
22 going to come in and say, "We've looked at the cell phone
23 records, and this is what they show."

24 And I think the layperson, just as I did when I first
25 read the transcript, would say, "They got him. There it
26 is." So -- and -- and it fits like the third cog behind

1 the identification issues, and it kind of seals the fate.

2 And when I sent it to Mr. Slovenski, I didn't know
3 what he was going to say. You know, I -- we talked to the
4 Sheriff's Department, we got the data. They had some
5 problems with getting it to him. So eventually, it came
6 directly from the ATF, from the lady who testified.

7 And he called me and he said, "There's a problem.
8 This data doesn't necessarily show that he was at Captain
9 D's. And the data that they have is flawed in that it
10 doesn't show what they have purported it to be in the
11 testimony."

12 So I think that Counsel was deficient in not doing
13 something. I mean, you can't get an attorney in your
14 office who has some cell phone experience to -- to look at
15 this data and -- and assist you. I think you need
16 somebody more than that, and I just think they were
17 deficient in doing that. I think they build on each
18 other.

19 Just in closing, and I won't go on any further, I
20 think that the lazy eye, they didn't do a thing about it.
21 The question about whether or not there was some
22 suggestiveness in the Facebook issue, they didn't do
23 anything about it. Just let it slide. Whether or not the
24 objection should've been made to the Facebook
25 identification prior to trial, I don't know. Just seems

1 odd to me. And then you compound that with just letting
2 this ATF expert testify that, for no other reason, has got
3 to be used by the State to say Mr. Upson was there.

4 I think it's a case of ineffective assistance of
5 counsel; and I think as a result, he was extremely
6 prejudiced and is serving 20 years as a result. Thank
7 you, Your Honor.

8 THE COURT: Thank you, Mr. Thomas.

9 MR. THOMAS: Yes, sir.

10 THE COURT: I'm going to take this under advisement;
11 however, I will leave the record open for 30 days to allow
12 the attorney's to make their -- the arrangements to get a
13 deposition of -- of trial counsel out of state.

14 MR. THOMAS: Thank you, Your Honor.

15 MS. COLEMAN: Thank you, Your Honor.

16
17 -- END OF TRANSCRIPT OF RECORD --
18
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24
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CERTIFICATE

I, the undersigned Bonnie H. Kelly, Official Court Reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the hearing of the captioned cause, relative to appeal, in the Second Circuit Court for Aiken County, South Carolina, on the 8th day of May, 2018.

I do further certify that I am neither of kin, counsel, nor interest in any party hereto.

e/ BONNIE H. KELLY

Bonnie H. Kelly, CVR

Official Court Reporter

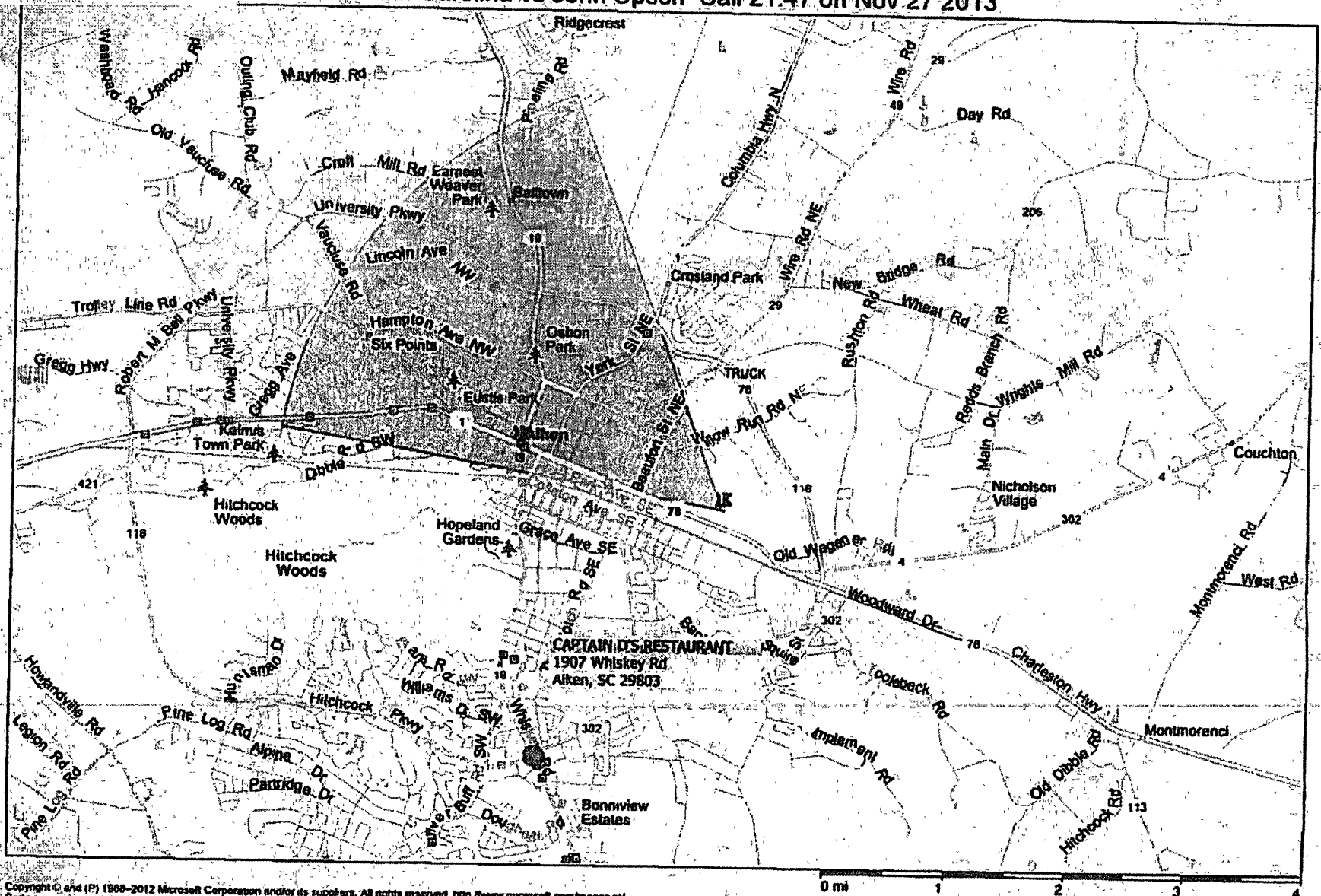
Columbia, South Carolina

January 22, 2018

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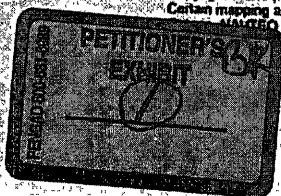
MISREPRESENTATION
OF ACTUAL INCIDENT
LOCATION

South Carolina vs John Upson Call 21.47 on Nov 27 2013



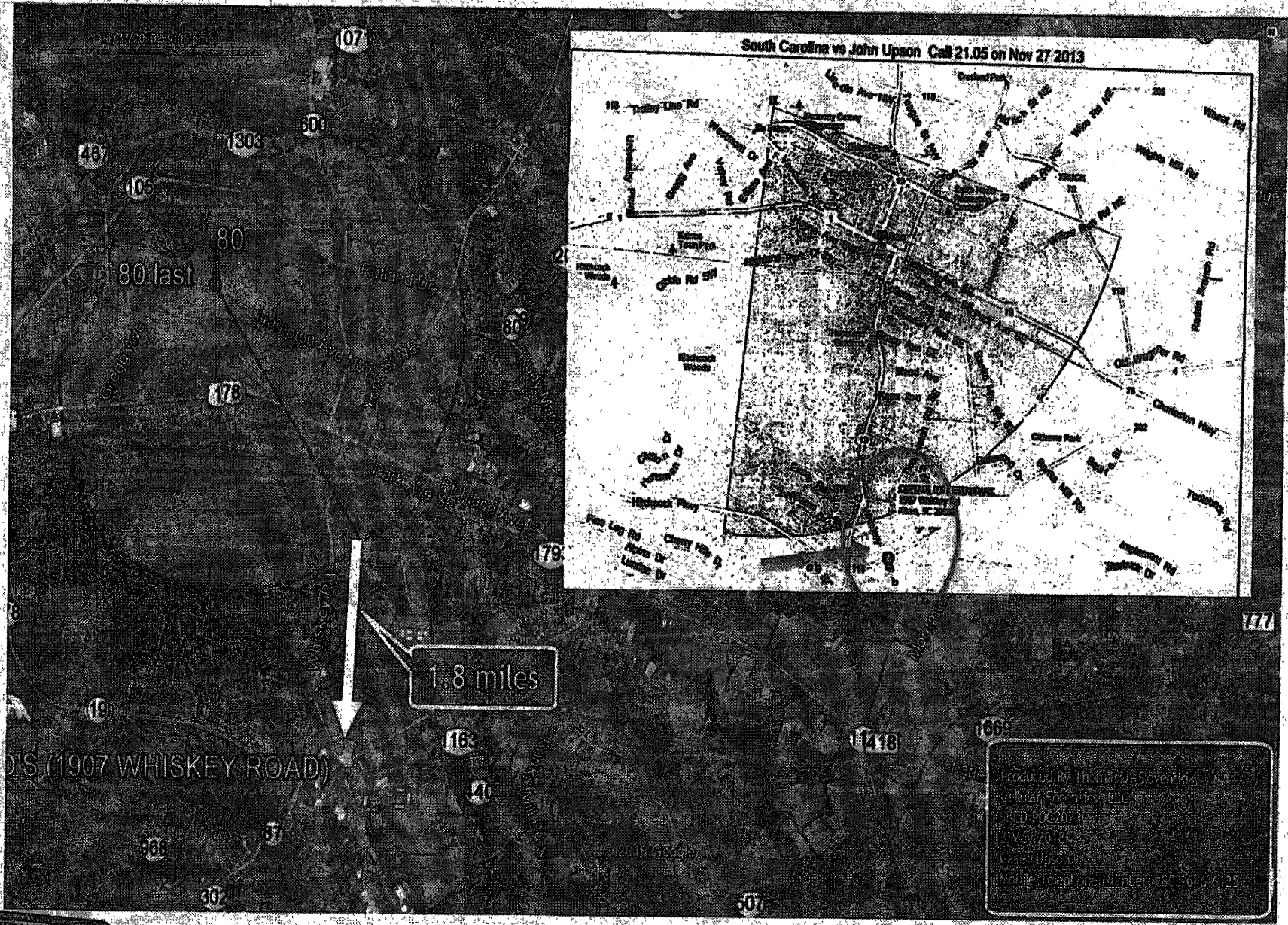
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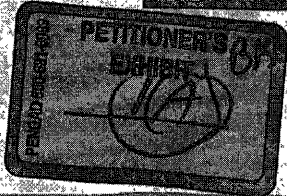


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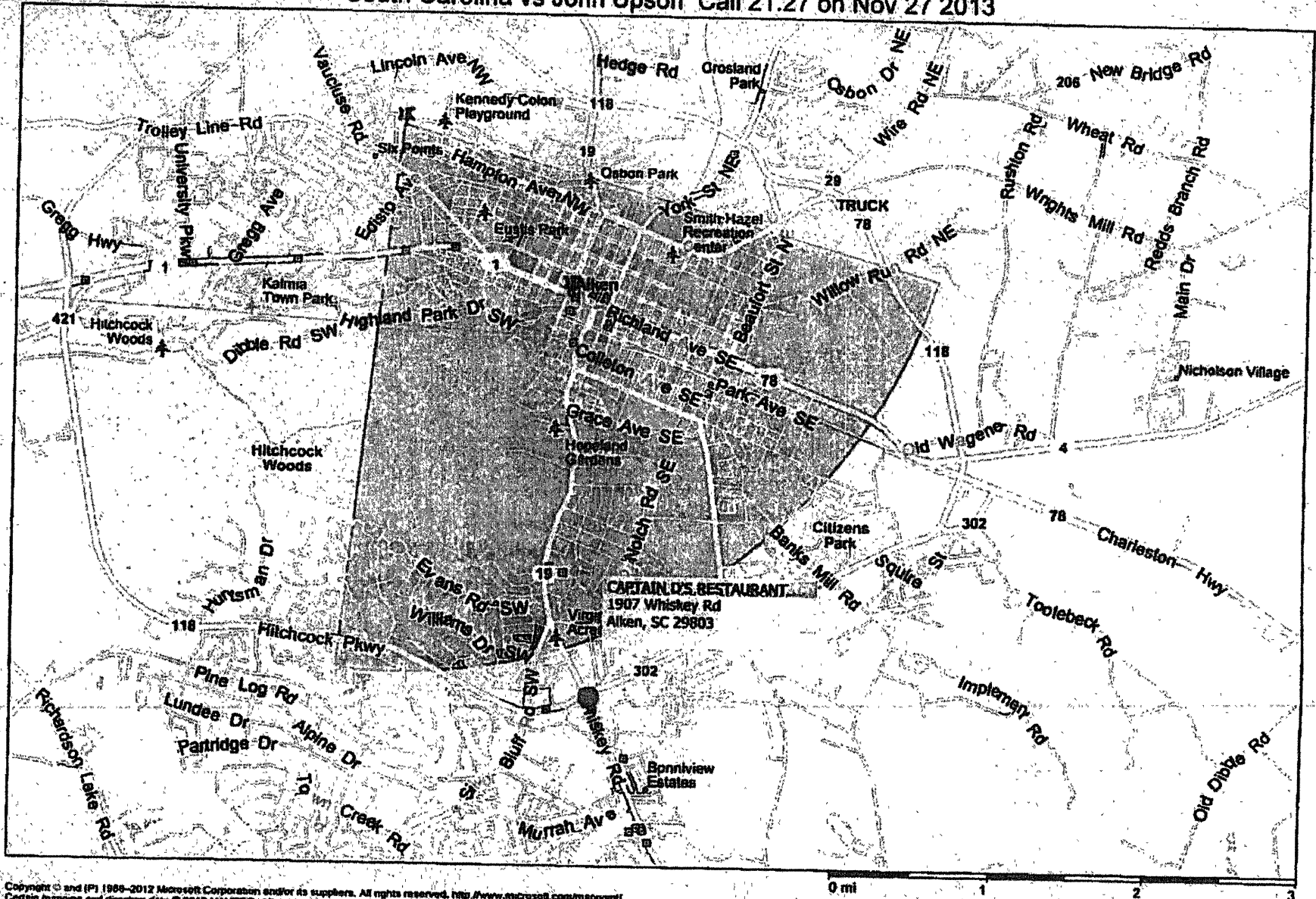


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Gross Misrepresentation
of Incident
Location

South Carolina vs John Upson Call 21.27 on Nov 27 2013



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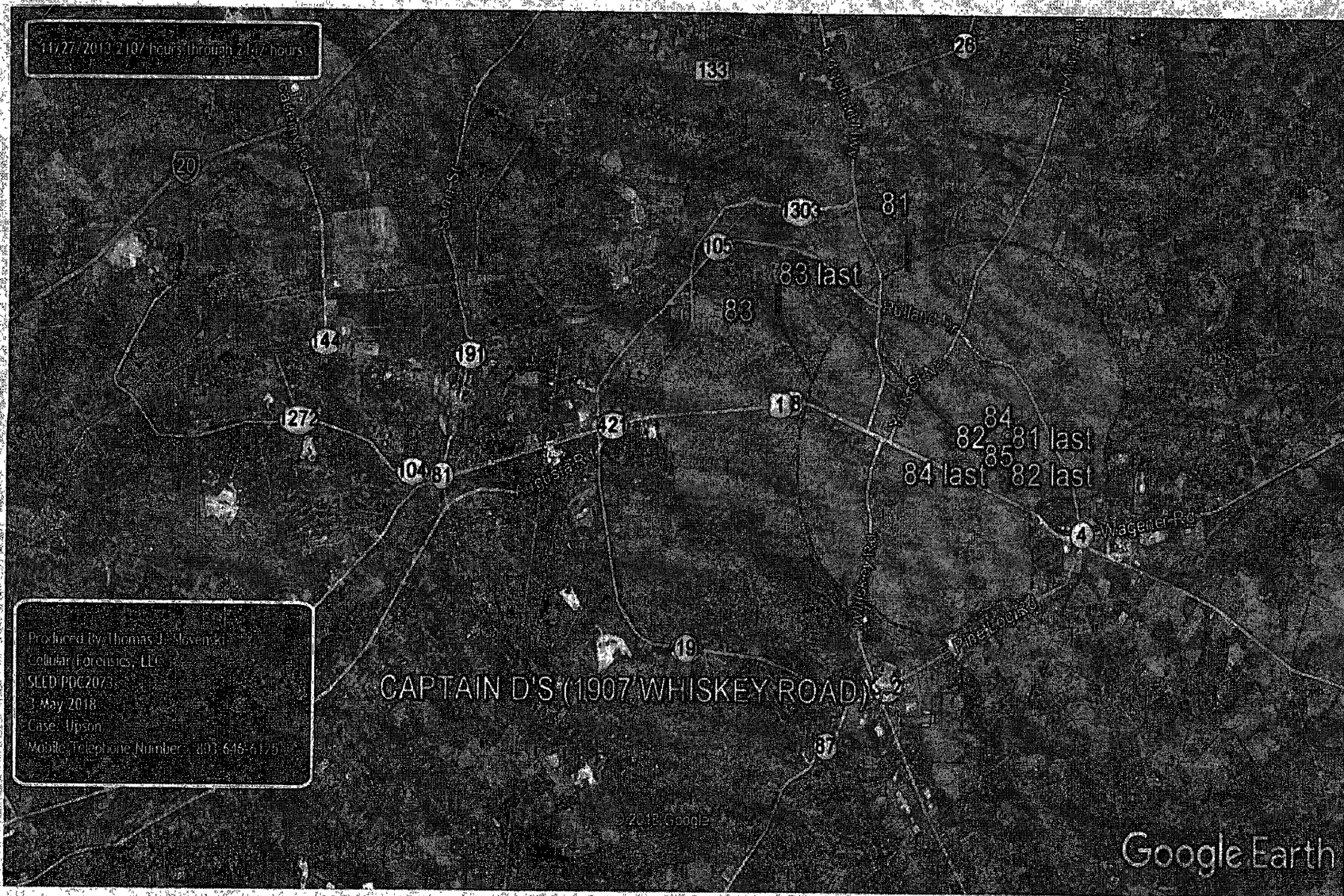


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2107-2147

INACURATE (STAIR)

2



Produced by Thomas J. Novack
Cellular Forensics, LLC
SLD PDC2073
3 May 2018
Case: Upson
Mobile Telephone Number: 803 646 6175

CAPTAIN D'S (1907 WHISKEY ROAD)

Google Earth

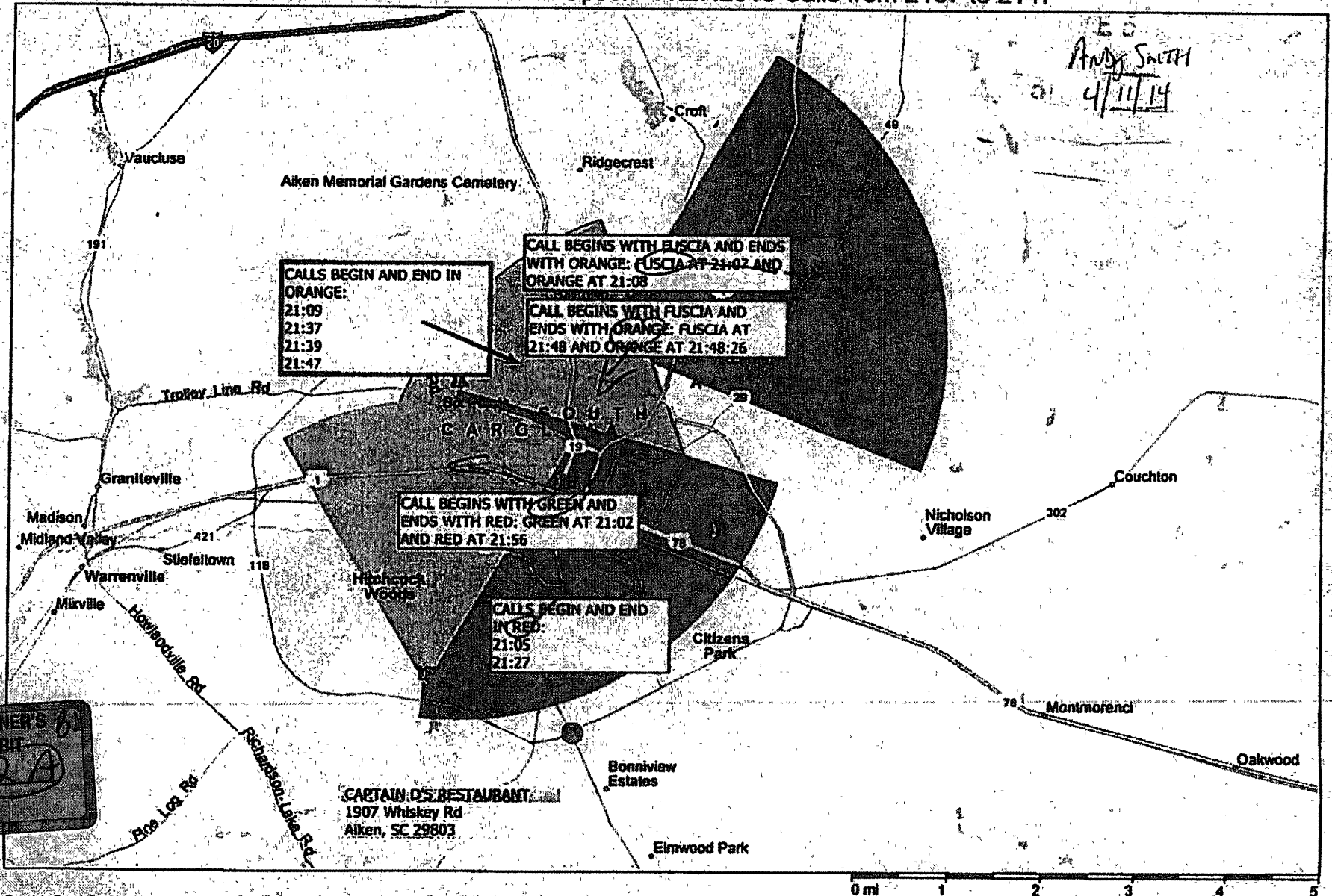
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South Carolina vs John Upson 11.27.2013 Calls from 2107 to 2147

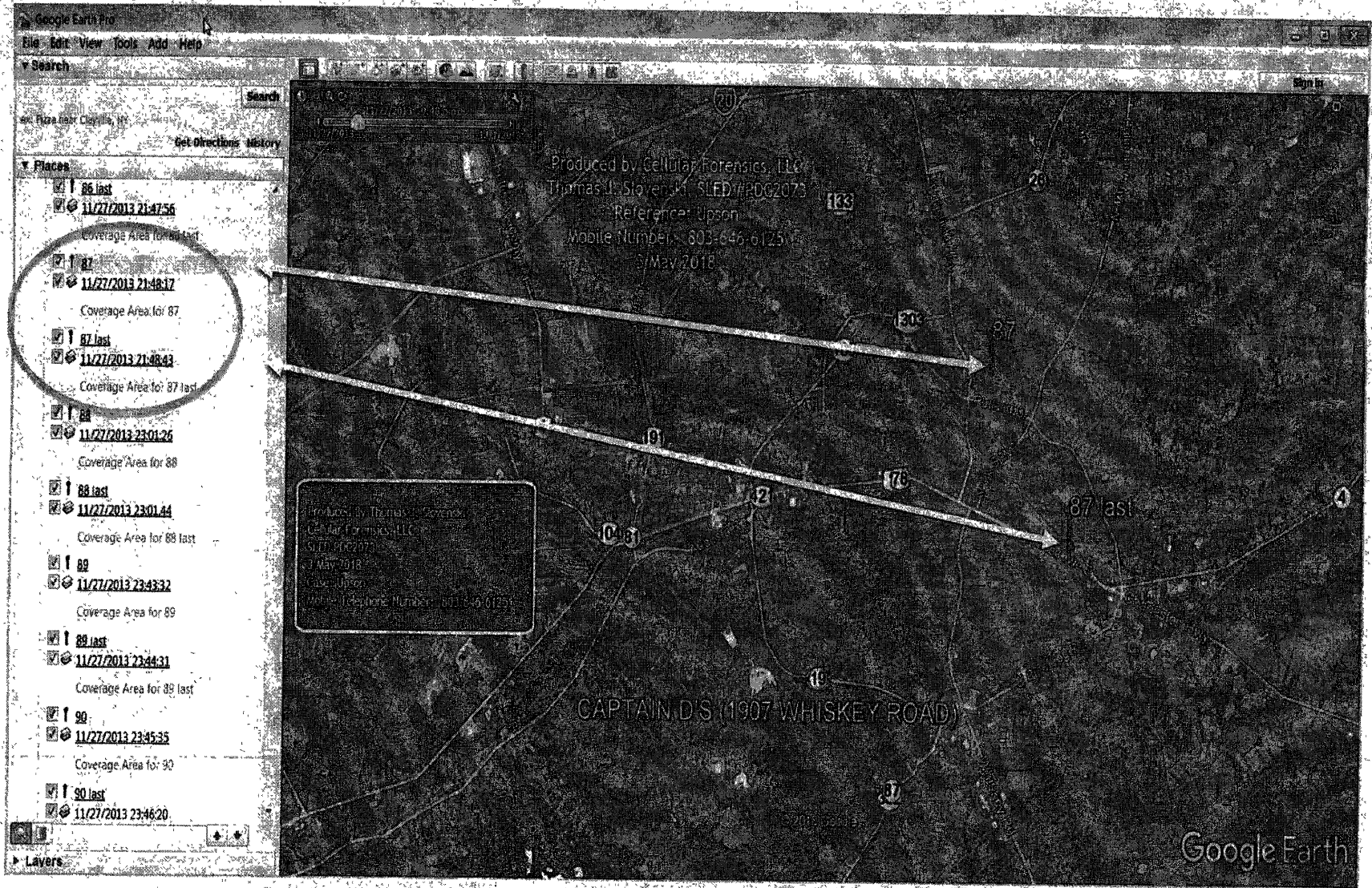
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EC
Andy Smith
4/11/14



AP 2472
PETITIONER'S EXHIBIT
24
472

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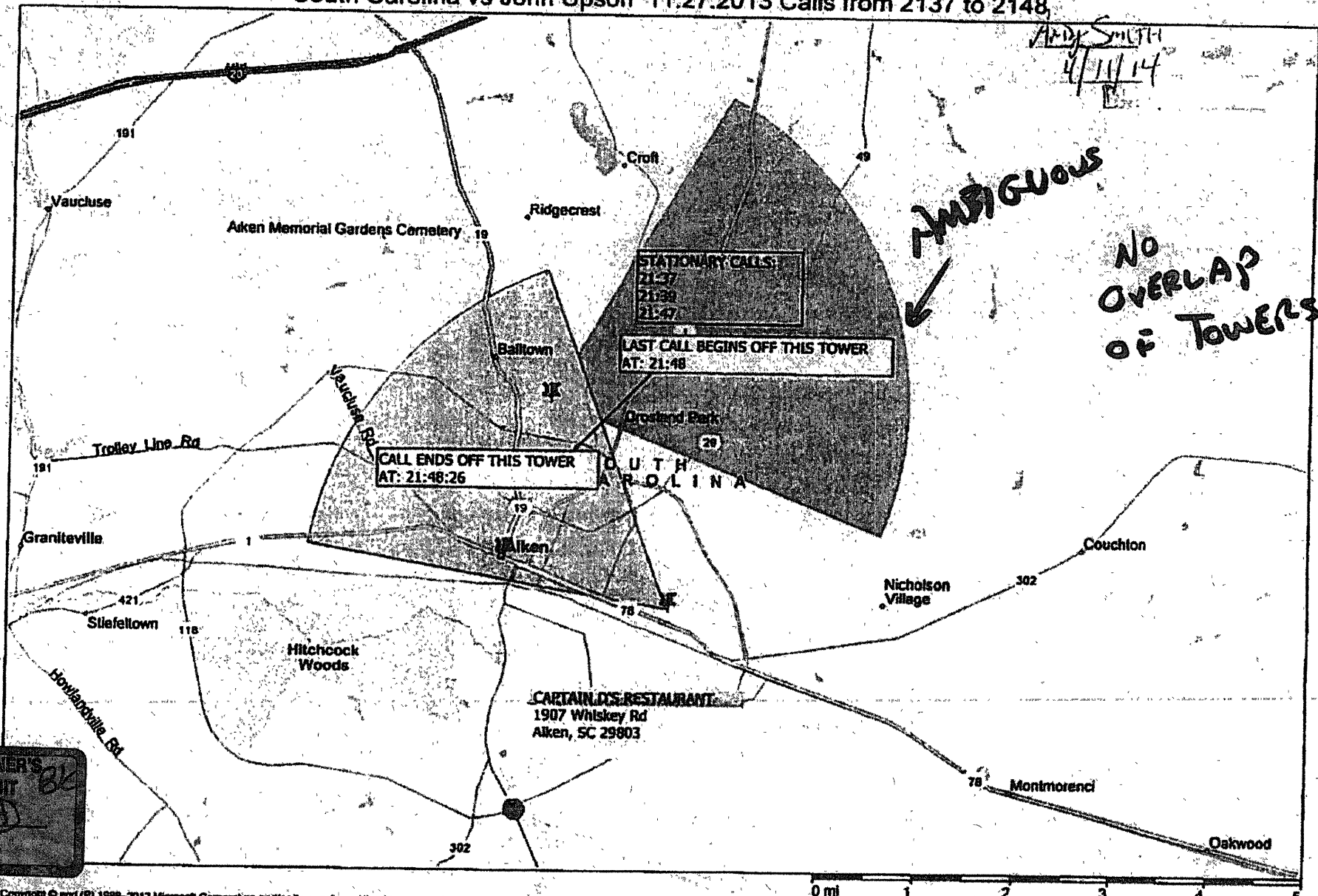


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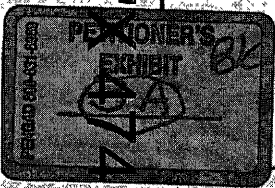


South Carolina vs John Upson 11.27.2013 Calls from 2137 to 2148

Andy Smith
4/11/14
E



APP



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STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

IN THE COURT OF COMMON PLEAS
DOCKET NO.: 2017-CP-02-0129

JOHN UPSON #229134)

Applicant,)

v.)

STATE OF SOUTH CAROLINA,)

Respondent.)

**ORDER GRANTING POST-
CONVICTION RELIEF**

THIS MATTER is now before the Court pursuant to an Application for Post-Conviction Relief filed on January 23, 2017. The State filed their Return on May 16, 2017. Present before the Court is Julie Coleman, Esq. from the Office of the Attorney General representing the Respondent. The Applicant was present represented by his attorney Tommy A. Thomas. Witnesses for the Applicant, Tom Slovenski and for the Respondent, Second Circuit Public Defender De Grant Gibbons were also present.

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Aiken County. In January 2014, the Aiken County Grand Jury indicted Applicant for Armed Robbery (2017-GS-02-0074) and two counts of Kidnapping (2014-GS-02-0079, 0080). Andrew Smith, Esquire represented Applicant. Solicitor James Strom Thurmond, Jr., Esquire prosecuted the case. On April 15-16, 2014, Applicant proceeded to trial before the Honorable Donald B. Hocker. The jury found Applicant guilty as indicted. Judge Hocker sentenced Applicant to imprisonment for concurrent terms of twenty years each for Armed Robbery and Kidnapping.

Applicant filed a timely notice of appeal. John H. Strom, Esq., of the Office of Appellate Defense perfected the appeal. The issue raised on Appeal was the trial court erred in denying Petitioner's directed verdict motion where the evidence presented at Appellant's trial and inferences arising therefrom were not sufficient to establish that money or property belonging to Captain D's Seafood was forcibly taken from the person or in the presence of Devin Johnson. The South Carolina Court of Appeals affirmed Applicant's conviction on June 1, 2016. State v. Upson, Op. No. 2016-UP-237 (S.C. Ct. App. filed June 1, 2016). The remittitur was returned to the Circuit Court on June 17, 2016.

In the Application for Post-Conviction Relief, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective assistance of trial counsel"
 - a. "Failure to fully cross-examine Jameshia Alston."
 - b. "Failure to ask for Neils v. Biggers hearing."
 - c. "Failure to subpoena alibi witnesses Ivory Corley, Nicole Bright and Brenda Smith."
 - d. "Failure to fully put the State's case to the test/or fully refute the State's theory of the case with available evidence and witnesses, which resulted in prejudice to Applicant."
 - e. "Failure to object to Applicant being charged and standing trial for armed robbery when the 14th and 6th Amendments were violated by the confrontation clause."
 - f. "Failure to object to in-court identification."
 - g. "Failure to object to bolstering by the State during closing arguments."

TESTIMONY

John Upson

The Applicant, John Upson, took the stand and testified that he was serving time for Armed Robbery and two counts of Kidnapping. That he received a twenty (20) year

concurrent sentence for two counts of kidnapping and one count of Armed Robbery. The Applicant testified that he did not commit this crime and that his theory of defense in this case was an alibi. That he was not present at the scene of the incident. The Applicant further testified that this case revolved around a misidentification. That he was identified by the witness, Jameshia Austin, who was in the back of the restaurant at the time. That she found him on the internet after she left work and identified him as one of the individuals involved in the Robbery. (Trial Tr. p. 56, lines 5-25). That Ms. Austin testified at Trial that one of the things that helped her to identify the applicant was that he had a "lazy eye". (Trial Tr. p. 58, lines 1-3) He stated that he felt there was confusion and conflict in statements she had given to the police. That she recognized one of the individuals involved in the Robbery but didn't know his name. (Trial Tr. p. 64, lines 4-8) She discovered the name of this individual after she got home and looked on Facebook. (Trial Tr. p. 61, lines 11-21). Ms. Austin testified that she was shown a list of names. (Trial Tr. p. 33, lines 22-24) and that the Applicant believed that this was suggested by the Police. Ms. Austin found the name of the Applicant through one of her co-workers, William Keels and that she found the Applicant through Mr. Keel's friends on Facebook. (Trial Tr. p. 65, lines 13-25) The Applicant pointed out that the police did not conduct a photo lineup. The Applicant testified that trial counsel did not file a Pre-Trial Motion to Suppress the identification and that there was no cross-examination of the testimony of this witness regarding the identification of the "lazy eye". (Trial Tr. p. 77, lines 14-17)

In addition, the Applicant testified that there was a discrepancy in the described height of the suspect. The Applicant is 5 feet 7 inches tall. The witness testified that the suspect was 6 feet tall. (Trial Tr. p. 87, lines 5-7)

Regarding the alibi defense, the Applicant testified that he was at a comedy show at the Aiken Center for the Arts and the show was scheduled to start at 8:00 p.m. After the show, he attended a party at a local bar that started at 11:00 p.m.

The Applicant stated that the State attempted to place him at the scene of the Robbery through the use of his cell phone data. He believed that the testimony given by ATF (alcohol, tobacco and firearms) regarding cell phone information was misleading. (Trial Tr. p. 136-163) The Applicant testified that he thought that his Defense Attorney was ineffective for no cross examination to point out discrepancies in this cell phone information. That had counsel conducted a proper investigation, it could have shown that the State's evidence did not place him at the location at the time of the incident.

The Applicant also stated that the Directed Verdict Motion was raised and that the issue was that there was no testimony that any money was taken from the scene. The Applicant finally testified that he thought it was important that Devin Johnson did not come to Court and that he did not testify (Trial Tr. p. 170, lines 1-5, p. 175-179)

Tom Slovenski

Testimony was then presented from Tom Slovenski, of Cellular Forensics. Mr. Slovenski was qualified by the Court as an expert in the field of mobile phone forensics. Mr. Slovenski testified that he had obtained copies of the raw data that was provided to ATF by Verizon Wireless. That this was the same data that had been provided to the Aiken County Sheriff's Department and that this was the same data that had been testified to in Court. Mr. Slovenski stated that he had examined the data and the maps that were given to him from Aiken County. That one peculiarity that he noticed in the data and maps was that there were no reference point, creating concerns and question

with the data. That these maps had been generated by an older software product called Pin Link and that there are certain problems that can be associated with the use of Pin Link. One problem is that they are very susceptible to human error. Mr. Slovenski testified that as a result the data did not match the testimony in Mr. Upson's case. It appeared that there was an over estimate of coverage regarding the cell phone towers in question.

He was able to accomplish a more accurate coverage identification than the older use of Pin Link. Upon running his data, none of the data encompassed the location of Captain D's. That contrary to the testimony and presentation at Mr. Upson's trial, there was no data that showed him in the specific area of Captain D's. In fact, he identified a cell phone tower that was closer to the location in question than that used by the ATF expert. That the data revealed no pings off that tower. Mr. Slovenski testified that had he been called as a witness in this trial, that he could have raised serious doubt and question as to the validity of the State's cell tower evidence.

Mr. Slovenski further testified that a cell phone tower operate more like a cloud, rather than directional wedges aka Pie method. That it is inaccurate to draw a wedge from a cell phone tower that would potentially encompass a location. Data received or sent from a certain tower, does not necessarily mean that it is being sent or received from the side of the tower from which the wedge is drawn. This is all a matter of capacity and not just location. That the only way to have been able to exactly locate where a cell phone is, would be through PCMD (Per Call Measurement Data) records and that these are kept only for a short period of time. This data was never obtained by law enforcement in this case.

Trial Counsel

Trial Counsel was unable to testify as he has relocated out of state. He was unable to travel back to South Carolina for testimony. The State made a Motion to allow testimony by trial counsel by telephone. Counsel for the Applicant objected to this on the basis that the telephone would not allow him to show counsel documents and effectively cross-examine counsel. This matter was brought before the Court and the Court ruled that testimony would not be allowed in this case by telephone. However, the record was left open for thirty (30) days to add Trial Counsel's testimony if necessary. The State elected not to submit additional testimony.

De Grant Gibbons

Second Circuit Public Defender De Grant Gibbons was co-chair in the trial of this case. Mr. Gibbons testified that he met with the Applicant the day before trial. That Mr. Smith met with the Applicant on other occasions. That the theory of defense was alibi. Also that identification was an important issue. That there was a question as to whether Mr. Upson could have left the club at any given time and could have been involved in the robbery. He testified that that is why the cell phone records were important. He testified that it was not a bad Alibi Defense. That he did have another attorney in his office who had knowledge of cell phone data. This attorney reviewed this information as it was received from the State.

DISCUSSION OF LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E. 2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E 2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. At 117, 386 S.E. 2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. At 117-18, 386 S.E.2d at 625.

CONCLUSIONS OF LAW

This Court has had the opportunity to review the entire record and has heard the testimony and arguments as presented at the hearing. This Court has also had the opportunity to observe each witness and pass upon his or her credibility. This Court has

7 *BSS*

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weighed the testimony accordingly. Further, the Court has reviewed the Clerk of Court's records regarding the subject's convictions, the guilty plea transcript, Applicant's records from the South Carolina Department of Corrections, the Application for Post Conviction Relief and the legal arguments made by counsel.

Therefore, this Court makes the following findings of fact based upon all of the evidence presented.

The Court finds and concludes that pursuant to §17-27-20, S.C. Code of Laws (1976 as amended), this Court has the authority and jurisdiction to hear the Applicant's claim and make a ruling pursuant to the Uniform Post-Conviction Procedure Act.

Therefore, based upon the foregoing, the Court finds and concludes:

1. The identification of the Applicant was a key issue at trial.
2. In making the identification, the State relied upon the testimony of a witness who pulled a photograph from Facebook before speaking with law enforcement. When she did speak with law enforcement, she was presented with a list of names that included the Applicant's name. Counsel for the Applicant failed to challenge this by either requesting a *Neil v. Biggers* hearing or by objecting to its admission at trial.
3. The Court is particularly concerned with the testimony regarding Applicant's "lazy eye." The testimony provided a significant basis upon which the State's witness relied in making her identification. Once elicited at trial, Counsel for the Applicant failed to challenge this on cross-examination.

- a. The Court observed the Applicant at the evidentiary hearing and had the opportunity to personally study the Applicant's facial features. The

Court found that the Applicant clearly did not have a "lazy eye." The Court is concerned that this evidences a misidentification that led to the Applicant's conviction.

4. The Applicant also asserted an alibi defense that the State discredited through expert testimony that Counsel for the Applicant failed to challenge.

a. At the evidentiary hearing, the Applicant presented an expert witness whose testimony created significant doubt regarding the accuracy of the unchallenged testimony of the State's expert witness and the usage of the "pie method."

This Court specifically finds and concludes that both prongs of Strickland have been met by the Applicant. Trial Counsel's performance is deficient for the reasons as set forth above and that trial counsel's deficient performance has prejudiced the Applicant.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief be granted and that the Applicant's sentence be vacated; and
2. That the Applicant be released from the custody of SCDC and transferred to the custody of Aiken County pending the disposition of his case.
3. That any and all allegations not specifically addressed in this order are dismissed.

AND IT IS SO ORDRED this 13 day of July, 2018.

Waltham, SC
Aiken County


The Honorable R. Scott Sprouse
Judge of the Second Judicial Circuit

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)
JOHN UPSON #229134)
Applicant,)
v.)
STATE OF SOUTH CAROLINA,)
Respondent.)

IN THE COURT OF COMMON PLEAS

DOCKET NO.: 2017-CP-02-0129

CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, Secretary to Tommy A. Thomas, Esq., certify that I have served a copy of an Order Granting Post-Conviction Relief by depositing a copy of it in the United States Mail, postage prepaid and the return address clearly shown on said envelope to:

Julie Coleman, Esq.
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211-1549


Jacquelyn E. Miller
Tommy A. Thomas, Esq.
Attorney at Law
7588 Woodrow Street
P.O. Box 88
Irmo, S.C. 29063
(803) 732-5507

July 18, 2018

APP'X 484

STATE OF SOUTH CAROLINA)

COUNTY OF AIKEN)

JOHN UPSON #229134)

Applicant)

v.)

STATE OF SOUTH CAROLINA,)

Respondent.)

IN THE COURT OF COMMON PLEAS

DOCKET NO.: 2014-CP-02-0129

2017CP02 00129

**AMENDED
ORDER GRANTING POST-
CONVICTION RELIEF**

THIS MATTER is now before the Court pursuant to an Application for Post-Conviction Relief filed on January 23, 2017. The State filed their Return on May 16, 2017. Present before the Court is Julie Coleman, Esq. from the Office of the Attorney General representing the Respondent. The Applicant was present represented by his attorney Tommy A. Thomas. Witnesses for the Applicant, Tom Slovenski and for the Respondent, Second Circuit Public Defender De Grant Gibbons were also present.

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Aiken County. In January 2014, the Aiken County Grand Jury indicted Applicant for Armed Robbery (2017-GS-02-0074) and two counts of Kidnapping (2014-GS-02-0079, 0080). Andrew Smith, Esquire represented Applicant. Solicitor James Strom Thurmond, Jr., Esquire prosecuted the case. On April 15-16, 2014, Applicant proceeded to trial before the Honorable Donald B. Hocker. The jury found Applicant guilty as indicted. Judge Hocker sentenced Applicant to imprisonment for concurrent terms of twenty years each for Armed Robbery and Kidnapping.

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APP'X 485

Applicant filed a timely notice of appeal. John H. Strom, Esq., of the Office of Appellate Defense perfected the appeal. The issue raised on Appeal was the trial court erred in denying Petitioner's directed verdict motion where the evidence presented at Appellant's trial and inferences arising therefrom were not sufficient to establish that money or property belonging to Captain D's Seafood was forcibly taken from the person or in the presence of Devin Johnson. The South Carolina Court of Appeals affirmed Applicant's conviction on June 1, 2016. State v. Upson, Op. No. 2016-UP-237 (S.C. Ct. App. filed June 1, 2016). The remittitur was returned to the Circuit Court on June 17, 2016.

In the Application for Post-Conviction Relief, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective assistance of trial counsel"

- a. "Failure to fully cross-examine Jameshia Alston."
- b. "Failure to ask for Neils v. Biggers hearing."
- c. "Failure to subpoena alibi witnesses Ivory Corley, Nicole Bright and Brenda Smith."
- d. "Failure to fully put the State's case to the test/or fully refute the State's theory of the case with available evidence and witnesses, which resulted in prejudice to Applicant."
- e. "Failure to object to Applicant being charged and standing trial for armed robbery when the 14th and 6th Amendments were violated by the confrontation clause."
- f. "Failure to object to in-court identification."
- g. "Failure to object to bolstering by the State during closing arguments."

TESTIMONY

John Upson

The Applicant, John Upson, took the stand and testified that he was serving time for Armed Robbery and two counts of Kidnapping. That he received a twenty (20) year

concurrent sentence for two counts of kidnapping and one count of Armed Robbery.

The Applicant testified that he did not commit this crime and that his theory of defense in this case was an alibi. That he was not present at the scene of the incident. The Applicant further testified that this case revolved around a misidentification. That he was identified by the witness, Jameshia Austin, who was in the back of the restaurant at the time. That she found him on the internet after she left work and identified him as one of the individuals involved in the Robbery. (Trial Tr. p. 56, lines 5-25). That Ms. Austin testified at Trial that one of the things that helped her to identify the applicant was that he had a "lazy eye". (Trial Tr. p. 58, lines 1-3) He stated that he felt there was confusion and confliction in statements she had given to the police. That she recognized one of the individuals involved in the Robbery but didn't know his name. (Trial Tr. p. 64, lines 4-8) She discovered the name of this individual after she got home and looked on Facebook. (Trial Tr. p. 61, lines 11-21). Ms. Austin testified that she was shown a list of names. (Trial Tr. p. 33, lines 22-24) and that the Applicant believed that this was suggested by the Police. Ms. Austin found the name of the Applicant through one of her co-workers, William Keels and that she found the Applicant through Mr. Keel's friends on Facebook. (Trial Tr. p. 65, lines 13-25) The Applicant pointed out that the police did not conduct a photo lineup. The Applicant testified that trial counsel did not file a Pre-Trial Motion to Suppress the identification and that there was no cross-examination of the testimony of this witness regarding the identification of the "lazy eye". (Trial Tr. p. 77, lines 14-17)

In addition, the Applicant testified that there was a discrepancy in the described height of the suspect. The Applicant is 5 feet 7 inches tall. The witness testified that the suspect was 6 feet tall. (Trial Tr. p. 87, lines 5-7)

Regarding the alibi defense, the Applicant testified that he was at a comedy show at the Aiken Center for the Arts and the show was scheduled to start at 8:00 p.m. After the show, he attended a party at a local bar that started at 11:00 p.m.

The Applicant stated that the State attempted to place him at the scene of the Robbery through the use of his cell phone data. He believed that the testimony given by ATF (alcohol, tobacco and firearms) regarding cell phone information was misleading. (Trial Tr. p. 136-163) The Applicant testified that he thought that his Defense Attorney was ineffective for no cross examination to point out discrepancies in this cell phone information. That had counsel conducted a proper investigation, it could have shown that the State's evidence did not place him at the location at the time of the incident.

The Applicant also stated that the Directed Verdict Motion was raised and that the issue was that there was no testimony that any money was taken from the scene. The Applicant finally testified that he thought it was important that Devin Johnson did not come to Court and that he did not testify (Trial Tr. p. 170, lines 1-5, p. 175-179)

Tom Slovenski

Testimony was then presented from Tom Slovenski, of Cellular Forensics. Mr. Slovenski was qualified by the Court as an expert in the field of mobile phone forensics. Mr. Slovenski testified that he had obtained copies of the raw data that was provided to ATF by Verizon Wireless. That this was the same data that had been provided to the Aiken County Sheriff's Department and that this was the same data that had been testified to in Court. Mr. Slovenski stated that he had examined the data and the maps that were given to him from Aiken County. That one peculiarity that he noticed in the data and maps was that there were no reference point, creating concerns and question

with the data. That these maps had been generated by an older software product called Pin Link and that there are certain problems that can be associated with the use of Pin Link. One problem is that they are very susceptible to human error. Mr. Slovenski testified that as a result the data did not match the testimony in Mr. Upson's case. It appeared that there was an over estimate of coverage regarding the cell phone towers in question.

He was able to accomplish a more accurate coverage identification than the older use of Pin Link. Upon running his data, none of the data encompassed the location of Captain D's. That contrary to the testimony and presentation at Mr. Upson's trial, there was no data that showed him in the specific area of Captain D's. In fact, he identified a cell phone tower that was closer to the location in question than that used by the ATF expert. That the data revealed no pings off that tower. Mr. Slovenski testified that had he been called as a witness in this trial, that he could have raised serious doubt and question as to the validity of the State's cell tower evidence.

Mr. Slovenski further testified that a cell phone tower operate more like a cloud, rather than directional wedges aka Pie method. That it is inaccurate to draw a wedge from a cell phone tower that would potentially encompass a location. Data received or sent from a certain tower, does not necessarily mean that it is being sent or received from the side of the tower from which the wedge is drawn. This is all a matter of capacity and not just location. That the only way to have been able to exactly locate where a cell phone is, would be through PCMD (Per Call Measurement Data) records and that these are kept only for a short period of time. This data was never obtained by law enforcement in this case.

Trial Counsel

Trial Counsel was unable to testify as he has relocated out of state. He was unable to travel back to South Carolina for testimony. The State made a Motion to allow testimony by trial counsel by telephone. Counsel for the Applicant objected to this on the basis that the telephone would not allow him to show counsel documents and effectively cross-examine counsel. This matter was brought before the Court and the Court ruled that testimony would not be allowed in this case by telephone. However, the record was left open for thirty (30) days to add Trial Counsel's testimony if necessary. The State elected not to submit additional testimony.

De Grant Gibbons

Second Circuit Public Defender De Grant Gibbons was co-chair in the trial of this case. Mr. Gibbons testified that he met with the Applicant the day before trial. That Mr. Smith met with the Applicant on other occasions. That the theory of defense was alibi. Also that identification was an important issue. That there was a question as to whether Mr. Upson could have left the club at any given time and could have been involved in the robbery. He testified that that is why the cell phone records were important. He testified that it was not a bad Alibi Defense. That he did have another attorney in his office who had knowledge of cell phone data. This attorney reviewed this information as it was received from the State.

DISCUSSION OF LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E. 2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E 2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. At 117, 386 S.E. 2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. At 117-18, 386 S.E.2d at 625.

CONCLUSIONS OF LAW

This Court has had the opportunity to review the entire record and has heard the testimony and arguments as presented at the hearing. This Court has also had the opportunity to observe each witness and pass upon his or her credibility. This Court has

weighed the testimony accordingly. Further, the Court has reviewed the Clerk of Court's records regarding the subject's convictions, the guilty plea transcript, Applicant's records from the South Carolina Department of Corrections, the Application for Post Conviction Relief and the legal arguments made by counsel.

Therefore, this Court makes the following findings of fact based upon all of the evidence presented.

The Court finds and concludes that pursuant to §17-27-20, S.C. Code of Laws (1976 as amended), this Court has the authority and jurisdiction to hear the Applicant's claim and make a ruling pursuant to the Uniform Post-Conviction Procedure Act.

Therefore, based upon the foregoing, the Court finds and concludes:

1. The identification of the Applicant was a key issue at trial.
2. In making the identification, the State relied upon the testimony of a witness who pulled a photograph from Facebook before speaking with law enforcement. When she did speak with law enforcement, she was presented with a list of names that included the Applicant's name. Counsel for the Applicant failed to challenge this by either requesting a *Neil v. Biggers* hearing or by objecting to its admission at trial.
3. The Court is particularly concerned with the testimony regarding Applicant's "lazy eye." The testimony provided a significant basis upon which the State's witness relied in making her identification. Once elicited at trial, Counsel for the Applicant failed to challenge this on cross-examination.

- a. The Court observed the Applicant at the evidentiary hearing and had the opportunity to personally study the Applicant's facial features. The

Court found that the Applicant clearly did not have a "lazy eye." The Court is concerned that this evidences a misidentification that led to the Applicant's conviction.

4. The Applicant also asserted an alibi defense that the State discredited through expert testimony that Counsel for the Applicant failed to challenge.

a. At the evidentiary hearing, the Applicant presented an expert witness whose testimony created significant doubt regarding the accuracy of the unchallenged testimony of the State's expert witness and the usage of the "pie method."

This Court specifically finds and concludes that both prongs of Strickland have been met by the Applicant. Trial Counsel's performance is deficient for the reasons as set forth above and that trial counsel's deficient performance has prejudiced the Applicant.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief be granted and that the Applicant's sentence be vacated; and
2. That the Applicant be released from the custody of SCDC and transferred to the custody of Aiken County pending the disposition of his case.
3. That any and all allegations not specifically addressed in this order are dismissed.

AND IT IS SO ORDRED this 7 day of August, 2018.


The Honorable R. Scott Sprouse
Judge of the Second Judicial Circuit

Aiken County

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

John Lyndon Upson, #229134,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

2017-CP-02-0129

**MOTION TO ALTER OR AMEND
PURSUANT TO RULE 59(e)**

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed January 24, 2017. Respondent made its Return on May 16, 2017. An evidentiary hearing was held on May 8, 2018, at the Aiken County Courthouse. Applicant was present at the hearing and represented by Tommy A. Thomas, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman, Esquire, of the South Carolina Attorney General's Office. This Court issued an order granting post-conviction relief, which was amended by an order signed August 7, 2018, filed August 10, 2018, and served on Respondent August 10, 2018. Respondent now respectfully moves for the Court to reconsider its order granting PCR based on the following:

I. PROCEDURAL HISTORY AND ALLEGATIONS

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. In January 2014, the Aiken County Grand Jury indicted Applicant for armed robbery (2017-GS-02-0074) and two counts of kidnapping (2014-GS-02-0079, -0080). Andrew Smith, Esquire represented Applicant. Assistant Solicitors Jeffrey A. Slocum, Jr., Esquire, and Kevin Molony, Esquire, prosecuted the case. On April 15-16, 2014, Applicant proceeded to trial before the Honorable Donald B. Hocker. The

jury found Applicant guilty as indicted. Judge Hocker sentenced Applicant to imprisonment for concurrent terms of twenty years each for armed robbery and kidnapping.

Applicant filed a timely notice of appeal. John H. Strom, Esquire, of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on June 1, 2016. State v. Upson, Op. No. 2016-UP-237 (S.C. Ct. App. filed June 1, 2016). The remittitur was returned to the circuit court on June 17, 2016.

Applicant filed his timely application for post-conviction relief on January 24, 2017, alleging that he was being held unconstitutionally based on the following allegations:

1. Ineffective assistance of trial counsel
 - a. "Failure to fully cross-examine Jameshia Alston."
 - b. "Failure to ask for Neils v. Biggers hearing."
 - c. "Failure to subpoena alibi witnesses Ivory Corley, Nicole Bright, and Brenda Smith."
 - d. "Failure to fully put the State's case to the test/or fully refute the State's theory of the case with available evidence and witnesses, which resulted in prejudice to Applicant."
 - e. "Failure to object to Applicant being charged and standing trial for armed robbery when the 14th and 6th Amendments were violated by the confrontation clause."
 - f. "Failure to object to in-court identification."
 - g. "Failure to object to bolstering by the State during closing arguments."

II. APPLICABLE LAW

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

III. ARGUMENT

Respondent respectfully moves this Court to alter or amend the final order granting post-conviction relief based on the following reasons:

Failure to request a Neil v. Biggers hearing to challenge Victim's identification of Applicant

Respondent submits the Court erred in finding Trial Counsel ineffective for failing to request a Neil v. Biggers hearing to challenge the Victim's identification of Applicant because the Victim's identification of Applicant as the robber was made after her own, independent investigation and could not have been influenced by law enforcement.

Neil v. Biggers, 409 U.S. 188 (1972) allows criminal defendants to suppress testimony concerning an out-of-court identification if it resulted from a confrontation procedure by law enforcement that was unduly suggestive, resulting in a substantial likelihood of misidentification.

“When a defendant challenges the admissibility of a witness's identification, trial courts employ a two-pronged inquiry to determine whether due process requires suppression.” State v. Wyatt, 421 S.C. 306, 310–11, 806 S.E.2d 708, 710 (2017) (citing Biggers, 409 U.S. at 198-200; State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012)). “First, the court must determine whether the identification resulted from ‘unnecessarily suggestive’ police identification procedures.” Id. (citing Biggers, 409 U.S. at 198-99; Liverman, 398 S.C. at 138, 727 S.E.2d at 426). “The Supreme Court of the United States has repeatedly emphasized ‘that due process concerns arise only when law enforcement officers use an identification procedure that is both suggestive and unnecessary.’” Id. (citing Perry v. New Hampshire, 565 U.S. 228 (2012); Manson v. Brathwaite, 432 U.S. 98, 107, 109 (1977); Biggers, 409 U.S. at 198); see also Liverman, 398 S.C. at 138, 727 S.E.2d at 426 (describing the trial court's task under the first prong as determining “whether the identification resulted from unnecessary and unduly suggestive police procedures”). “If the court finds the police procedures were not suggestive, or that suggestive procedures were necessary under the circumstances, the inquiry ends there and the court need not consider the second prong.” Id.; See United States v. Sanders, 708 F.3d 976, 984 (7th Cir. 2013) (citing Perry for the proposition that “courts will only consider the second prong if a challenged procedure does not pass muster under the first”); State v. Dukes, 404 S.C. 553, 557-58, 745 S.E.2d 137, 139 (Ct. App. 2013) (same).

In Applicant's case, however, Biggers does not even apply, because the identification was not made after any sort of law enforcement confrontation procedure. In fact, law enforcement was not involved in any way in the Victim's identification of the robber until *after* the Victim made her identification. Therefore, the identification process could not possibly be unduly suggestive. This Court even found in the Order Granting PCR that “In making the

identification, the State relied upon the testimony of a witness who pulled a photograph from Facebook *before speaking with law enforcement.*” Order at 8 (emphasis added). It is undisputed that the Victim’s identification was made based on her own independent investigation on Facebook without any assistance from law enforcement. Her trial testimony showed she found a photograph of the robber on Facebook, matched the photograph to his name, and then provided the photograph and name to law enforcement herself. Accordingly, because law enforcement was not even involved with the identification, it cannot be suppressed as an unduly suggestive police procedure.

Because the facts of this particular identification do not qualify as a police procedure, the first prong of the Biggers test need not even be analyzed. Regardless, in analyzing the first prong, because the police procedures were not suggestive, the Court’s inquiry must end there without turning to the second prong or suppressing the evidence under Biggers.

Accordingly, Trial Counsel cannot be deficient for failing to request a Biggers hearing to move to suppress the Victim’s identification, because this request would be completely unnecessary, as Biggers does not even apply to this situation. Similarly, there can be no resulting prejudice from Trial Counsel’s failure to make this motion because the motion would not have been successful. The Victim’s identification of Applicant as the robber was completely admissible, and Trial Counsel cannot be ineffective for failing to move to suppress it. Accordingly, this Court should deny post-conviction relief.

Failure to challenge Victim’s testimony about Applicant’s “lazy eye”

Respondent submits the Court erred as a matter of law in finding Trial Counsel was ineffective for failing to challenge the Victim’s testimony about Applicant’s “lazy eye” because Trial Counsel made an adequate challenge to the accuracy of her identification at trial, and his

failure to emphasize the potential non-existence of a “lazy eye” does not rise to the level of deficiency.

At trial, the Victim made an in-court identification of Applicant as the robber of the store. Tr. 55-56. She also testified that she saw the robber’s eyes and nose during the robbery while she was being held hostage, and she recognized him as a customer who had been in the store two days before the robbery, when he ordered a large Sprite and took a picture with his friend, who worked there. Tr. 56. She testified she went home immediately after the robbery and did her own independent research on the internet. Tr. 56-57. The Victim testified that she found pictures of the man she recognized as the robber on her co-worker’s Facebook page, and she made a note of his name and sent his name to law enforcement. Trp. 57. She testified that she knew it was him because it’s her job to remember her customers, and she remembered his eye. “Like, that’s the thing that caught me, his eye and his bald head.” Tr. 58, line 1-3. She testified “He has a lazy eye. It’s kind of droopy, like that.” Tr. 77, line 17.

This Court granted post-conviction relief, finding Trial Counsel was ineffective for failing to challenge the Victim’s testimony about his “lazy eye,” because the Court had the opportunity to observe Applicant and found he did not have a lazy eye. However, Trial Counsel was not deficient because he did extensively challenge the Victim’s identification of the robber, and there was no resulting prejudice.

First, Trial Counsel was not deficient. He cross-examined the Victim at trial about her identification of the robber, and how he was wearing a hood and a bandana around his face. Tr. 68 – 76. In his closing argument, Trial Counsel extensively challenged the Victim’s identification of the robber. Tr. 210 – 224. He pointed out that the robbers had their faces partially covered, and all that was visible was their nose and eyes. Tr. 213. Trial Counsel played

a “game” with the jury throughout his closing argument, which De Grant Gibbons opined at the evidentiary hearing was very effective, where he covered up everything but the nose and eyes on pictures of celebrities and asked the jury to figure out who they were. He compared this exercise to the Victim’s experience, except he pointed out that the Victim did not know Applicant other than a brief interaction with him as a customer two days before the robbery.

Trial Counsel clearly challenged the Victim’s identification of the robber very thoroughly. Just because he did not specifically challenge her description of a “lazy eye” does not mean his cross-examination and closing argument rise to the level of deficiency. Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland v. Washington, 466 U.S. 668, 688-689 (1984). “Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.” Id. at 691. Therefore, judicial scrutiny of counsel’s performance must be highly deferential. Id. at 689. Respondent submits Trial Counsel was not deficient on this ground.

Secondly, there is no resulting prejudice from Trial Counsel’s failure to emphasize the lack of a “lazy eye” because the jury was able to view Applicant from a close distance and judge for themselves whether or not he had a “lazy eye” even without Trial Counsel’s instruction to do so. The jury was present in the courtroom and undoubtedly examined Applicant for themselves to develop their own opinion. And, regardless of whether or not Applicant had a proper “lazy eye,” the Victim made a clear, independent identification of Applicant as the robber because she recognized him as a customer from two days prior. The testimony also showed Applicant was

friends with a Captain D's employee, and that Applicant's cell phone made two phone calls to Captain D's immediately before it was robbed on the night of the crime (see below). This evidence is not enough to be counteracted by any potential failure to point out his lack of a "lazy eye." Accordingly, there is no resulting prejudice.

Because Applicant failed to prove deficiency or prejudice, this Court should deny post-conviction relief.

Failure to challenge State's expert witness

Respondent submits the Court erred in finding Trial Counsel was ineffective for failing to present expert testimony to challenge the State's cell tower expert witness at trial because the record shows neither deficiency nor prejudice on this ground. Applicant was convicted of robbing a Captain D's restaurant in Aiken on November 27, 2013, around 10:00 P.M. Tr. 58.

At trial, the State presented testimony from Desra Sheryl Fraser, an intelligence research specialist for the Bureau of Alcohol, Tobacco, Firearms, and Explosives. Tr. 147 – 162. Fraser testified about the location of the cell phone towers used by Applicant's cell phone on the night of the crime, as well as the phone calls made to and from the telephone during that time period. Fraser presented a map she created on which she plotted the location from which the telephone was used. Her testimony was not used to show that Applicant's phone was in use at or near the scene of the crime, but rather it was used to disprove Applicant's alibi, to show that he was not at or near the comedy show he and his witnesses claim he was attending on the night in question. She testified that the towers used to transmit a phone call placed at 9:48 P.M. from Applicant's phone likely showed that the cell phone was moving while the calls were being transmitted. Tr. 155, line 16 – 156, line 17.

Importantly, Fraser also testified that Applicant's cell phone made a phone call to Captain D's, the restaurant that was robbed, at 9:37 P.M. on the night of the crime. Tr. 151, line 4-6. The phone records then showed that Applicant's cell phone made another blocked phone call to Captain D's at 9:47 P.M. Tr. 151, line 22-23.

Trial Counsel cross-examined Fraser at trial, pointing out to the jury that there was no way for her to know that Applicant was actually with or using his cell phone at the times she was analyzing, and there was no way for her to know the content of the telephone conversations. Tr. 157-158. He questioned her on her ability to know if the phone was moving or stationary. Trial Counsel also introduced another cell tower map that she prepared but the State did not introduce to question her about why the cell tower locations were different from the State's maps. Tr. 160.

At the evidentiary hearing, Applicant presented testimony from Tom Slovenski, who was qualified as an expert witness in the field of mobile phone forensics. Slovenski testified that he had examined the exact cell tower data that the State's original witness, Fraser, used and testified about at trial, but he found problems with the way Fraser ran and presented the information. The Order Granting PCR summarized that the maps were generated by an "older software product" called Pin Link, which is very susceptible to human error, and "Mr. Slovenski testified that as a result the data did not match the testimony in Mr. Upson's case. It appeared that there was an over estimate of coverage regarding the cell phone towers in question." Order at 5.

Slovenski criticized the "pie method" used in Fraser's analysis, explaining that cell phone towers operate more like a cloud than a directional wedge. He testified that, in his preparation for the evidentiary hearing, he used new technology to analyze the data, which was, in his opinion, more accurate than Fraser's data run through Pin Link. The Order found that "contrary to the

testimony and presentation at Mr. Upson's trial, there was no data that showed him in the specific area of Captain D's." Order at 5. Slovenski testified that the State's map used at trial was "outdated and inaccurate." However, Slovenski testified that the new program he used to analyze the data before the evidentiary hearing did not exist at the time of the investigation or trial in April, 2014, and Pin Link was the standard technology that was used at the time.

Slovenski also testified that there is more accurate information stored by cell phone companies that would give them an exact location of the cell phone every fifteen minutes, but these records are only stored for about seven days before they are deleted. He testified that this data was not collected in this case. He explained that the investigating detective could have requested this information because it would have been within seven days, but he might not have known about it at the time of the investigation.

Respondent submits Trial Counsel cannot be deficient for failing to present Slovenski as an expert witness at trial to challenge Fraser's testimony because Slovenski's testimony was based on technology that did not exist at the time of trial in 2014. Attorneys are not required to be clairvoyant of future changes in the law, in facts, or in technology. See generally State v. Tapp, 398 S.C. 376, 385-86, 728 S.E.2d 468, 473 (2012) ("While our preservation rules require that objections to the admissibility of evidence be specific, they most certainly do not require clairvoyance."). South Carolina courts have "never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial." Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993).

Likewise, Trial Counsel cannot be deficient for failing to find an expert who used a technology that did not exist at the time of trial. Pin Link, the system Fraser used in her trial testimony, was the current, accurate system used by law enforcement agencies at the time, as was

her "pie method" of charting cell tower data. Any criticism of these methods now, more than four years later, in an ever-changing and evolving technological world, should not be the basis for criticism of Trial Counsel's performance. Even if Slovenski himself had testified at Applicant's trial in 2014, his testimony would have been completely different than it was at the evidentiary hearing, because he would not have had access to the technology he claims is superior to Fraser's.

Trial Counsel thoroughly cross-examined Fraser at trial, pointing out inconsistencies in her maps for the jury and emphasizing that the use of Applicant's cell phone did not necessarily mean he was in a certain location. The Court's finding that he was deficient for failing to use non-existent technology at trial holds him to an entirely unreasonable standard. De Grant Gibbons also testified that he and Trial Counsel had someone within their office who knew how to read the cell tower data look at the evidence before the trial to help them prepare their argument. Trial Counsel's performance was clearly reasonable under prevailing professional norms at the time of trial. Accordingly, he cannot be deficient on this ground.

Secondly, there is no resulting prejudice from the failure to present Slovenski's testimony at trial because it would not have changed the outcome of the trial. While Slovenski opined that Fraser's cell tower data was used to place Applicant at the scene of the crime, the record and Public Defender De Grant Gibbons' testimony show that the State was using the records only to disprove Applicant's alibi, not to place him at the crime scene. Applicant presented alibi witnesses at trial, who testified that Applicant was at a comedy show during the crime. However, none of the alibi witnesses could testify that they physically saw Applicant at or around 10:00, during the comedy show. They all testified that they saw him before or after the show.

As discussed above, Fraser testified at trial that Applicant cell phone made two outgoing telephone calls to the Captain D's restaurant that was robbed very shortly before the robbery, which not only shows Applicant's connection to the scene of the crime and his interactions with someone within the restaurant, but also that his cell phone was making phone calls during the time that he was allegedly watching a comedy show. Finally, as also discussed in the sections above, Applicant was identified as the person who robbed the store by the victim who was held at gunpoint when she did her own independent investigation immediately following the crime. This evidence is very strong, and Respondent submits that any testimony used to challenge the cell tower data the State was using to disprove his alibi would not have made a difference in the jury's verdict.

De Grant Gibbons also opined that the cell tower data did not make much difference in the jury's verdict. He testified at the evidentiary hearing that he believed the phone records were so technical that the jury did not know what the State was trying to use them to say. He testified that the cell phone data would have been important if it had been "meaningful," but the State was only using it to disprove his alibi.

For these reasons, the record and testimony before the Court clearly show Trial Counsel was not deficient and there was no resulting prejudice from any alleged deficiency on this ground. Accordingly, this Court should deny post-conviction relief.

[conclusion and signature page to follow]

V.

For the reasons explained above, Respondent submits post-conviction relief was improperly granted and respectfully requests this Court to alter its judgment and deny Applicant's application for post-conviction relief.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JULIE A. COLEMAN
Assistant Attorney General
P.O. Box 11549
Columbia, S.C. 29211


Attorneys for Respondent
Columbia, South Carolina

August 20, 2018

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

JOHN LYDON UPSON, #229134,

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

2017-CP-02-0129

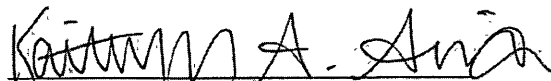
AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Motion to Alter or Amend Pursuant to Rule 59(e)** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

The Honorable R. Scott Sprouse
Presiding Judge, Second Judicial Circuit
Post Office Box 1277
Walhalla, South Carolina 29691

Tommy A. Thomas, Esquire
Post Office Box 88
Irmo, South Carolina 29063

DATED this 21st day of August, 2018.


Kaitlyn S. Slice, Legal Assistant
For Respondent

APP'X 507

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

John Lyndon Upson,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

Case No.: 2017-CP-02-0129

ORDER DENYING DEFENDANT'S MOTION
FOR RECONSIDERATION

After careful consideration of the able argument and filings of Counsel and review of the record, the Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or fact not appropriately considered. Accordingly, the Defendants's Motion, pursuant to Rule 59, SCRCP,¹ is DENIED.

AND, IT IS SO ORDERED.



R. SCOTT SPROUSE
Judge, Tenth Judicial Circuit

Walhalla, South Carolina
August 24, 2018

¹ The Court, in its discretion, has determined this Motion on the filings, without oral argument, pursuant to Rule 59(f), SCRCP.